165-386

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 151.

JAMES M. DEWEESE, JR., APPELLANT,

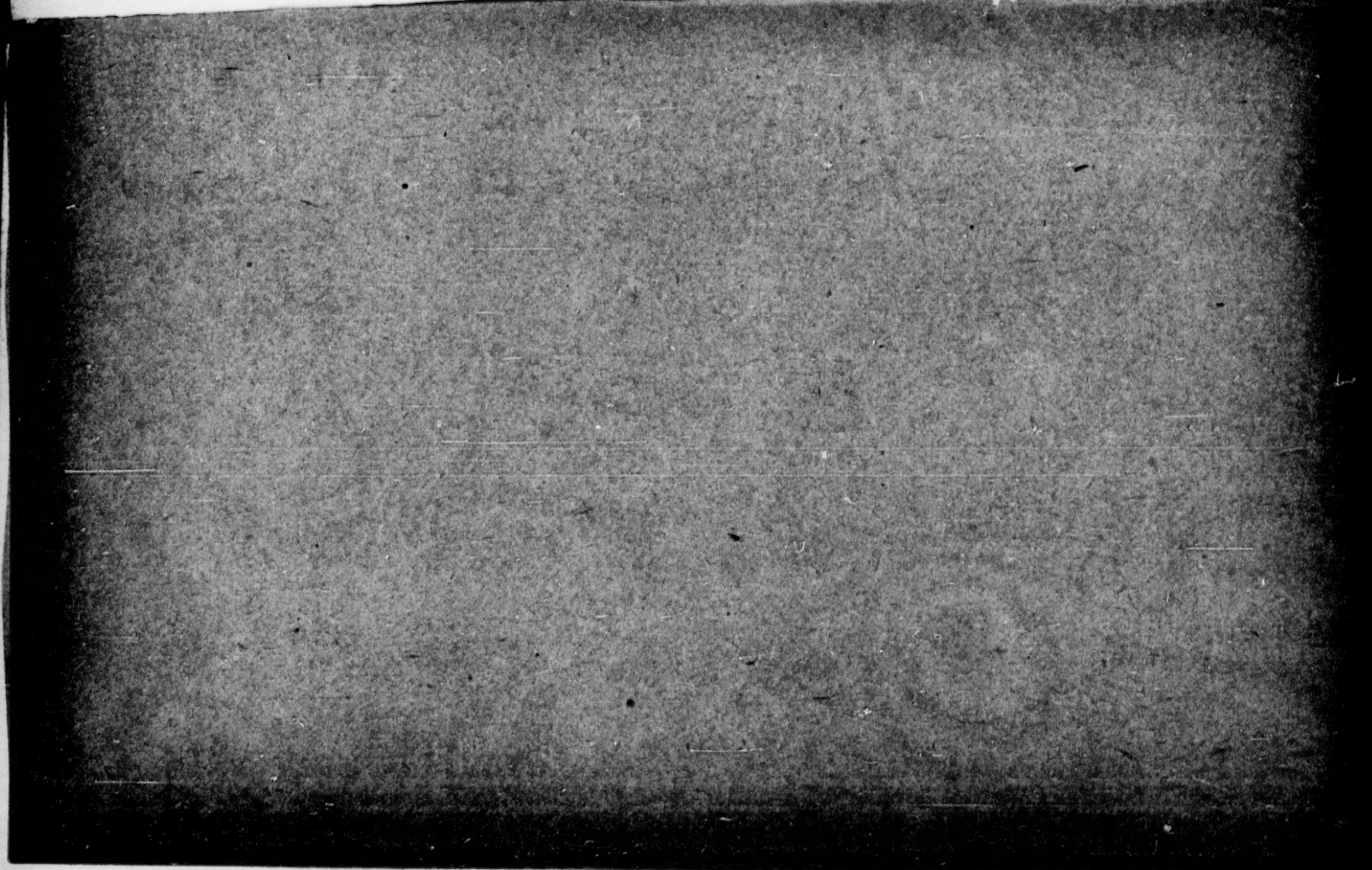
vs.

JACOB REINHARD, LOUISA FIESER, LOUIS F. FIESER, BERTHA M. KRAUS, AND GEORGE C. KRAUS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 6, 1894.

(15,658.)



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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at a term thereof begun and held at the United States court-rooms, at St. Paul, Minnesota, on the first Monday in May, it being the 7th day of May, A. D. 1894, before the Honorable Henry C. Caldwell and the Honorable Walter H. Sanborn, circuit judges, and the Honorable Amos M. Thayer, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the 9th day of October, A. D. 1893, a transcript of record, in pursuance to an appeal allowed by the circuit court of the United States for the district of Nebraska, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit; which said transcript of record is in the following words, to wit:

2 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for said district of Nebraska, within the eighth judicial circuit, at the term of May, A. D. 1893.

Be it remembered that on the 8th day of October, 1888, a bill of complaint was filed in the office of the clerk of said circuit court; which said bill of complaint is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES M. DEWEESE, JUNIOR,
vs.
JACOB R. REINHARD and FREDERICK FIESER.

James M. Deweese, Junior, a citizen of the county of Saline and State of Nebraska, brings this his bill of complaint against the said Jacob Reinhard and Frederick Fieser, citizens of the city of Columbus, in the State of Ohio.

And thereupon your orator complains and says that he is and has been a native-born citizen of the United States at all times mentioned herein, and has never exercised or exhausted his pre-emption or homestead rights granted by the laws of the United States relative to the acquirement of public lands, except in the respect hereinafter averred.

Your orator further shows to your honors that he is the owner and has been for more than five years last past and is in the exclusive, notorious, and adverse possession of the following-described real estate, to wit: The northeast quarter of section fourteen (14),

township five (5), range three (3) east of the sixth principal meridian, situated in Saline county, Nebraska, containing one hundred and sixty (160) acres, according to the Government survey, and which land is reasonably worth the sum of three thousand dollars ($3,000.00).

That your orator's ownership, title, interest, claim, and possession to said real estate is derived by virtue of a homestead filing made by the complainant herein under and by virtue of the laws of the United States.

2½ That the said land above described was at all times mentioned herein subject to entry and settlement under and by virtue of the homestead laws of the United States, and that on the 31st day of May, 1883, your orator being a citizen of the United States and over twenty-one years of age, entered and settled upon said lands and made application in due and legal form to the register and receiver of the land office at Beatrice, Nebraska, the district of said office extending over the lands in question, and your orator made the affidavit required by the homestead laws of the United States before the said register and receiver that he was over twenty-one years of age and a citizen of the United States, and that his entry on said land was made for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person; that said affidavit and said application complied in all respects with the rules and regulations of the Land Department of the United States and the law in regard to the making of homestead entries under the laws of the United States.

Your orator tendered the amount of fees that was due for such filing and application as required by law.

Your orator further shows to your honors that he has remained on said lands ever since the said 31st day of March, 1883, and occupied the same as his home and homestead, and has cultivated the same during that period in accordance with the rules and regulations of the Land Department and the laws of the United States and has not alienated the same nor any part thereof.

That on the 6th day of July, 1888, after having given due notice as provided by law, your orator made and tendered proof by two creditable witnesses that he had resided upon and cultivated said lands for a period of five years and more from the date of said entry in the manner required by law before the register & receiver of the United States land office at Lincoln, Nebraska, the district of said office them extending over the lands in question; and your orator also made oath before said register & receiver that he had not alienated said lands or any part thereof and that he would bear true allegiance to the Government of the United States; that he tendered the fees required with such proof, and has done all things necessary to be done and complied in all respects with the laws of the United States and the rules and regulations of the Land Department thereof respecting the entry, cultivation and acquirement of lands under the homestead laws of the United States to entitle him to a patent therefor.

3 Notwithstanding all this, the land officers of the United States rejected the application of your orator made as aforesaid on the 31st day of May, 1883, and also your orator's tender of proof and showing of full compliance with the homestead laws of the United States, and the claim of your orator of a patent to said lands, solely upon the ground that said lands had been selected by the State of Nebraska under the grant of lands made to said State for internal improvements by act of Congress approved September 4th, 1841.

Your orator alleges the facts to be that said lands above described lie within the limits of the grant of lands made by the United States to the Burlington & Missouri River Railroad Company by act of Congress approved July 2nd, 1864, and that by virtue of said act the Land Department of the United States withdrew from private entry the even-numbered section of land within the limits of said grant. That still later, and by virtue of the act of Congress approved March 6th, 1868, the even-numbered sections of land within the limits of said grant were made subject to pre-emption and homestead entry, said lands being raised to double minimum and subject to homestead and pre-emption entry, but not subject to private entry as were the Government lands outside the limits of said grant.

Your orator further says that Congress by act of September, 1841, granted to the State of Nebraska, 500,000 acres of unappropriated public lands in Nebraska, subject to private entry to aid in the construction of internal improvements; that by virtue of said act the State of Nebraska selected certain lands for said purpose and among others pretended to select the lands involved in this controversy and above described, which selection was made March 26th, 1868, and which selection was subsequently approved by the United States Land Department on or about March 29th, 1870; the total amount so selected by and approved to the State of Nebraska amounting to 504,131.86 acres.

Your orator further shows to your honors that the selection of said lands by the State of Nebraska and the approval of the same by the land officers of the United States was unauthorized by law, being made under a misconstruction of the law, said lands having been withdrawn from private entry prior to the date of said selection and approval, and rated at $2.50 per acre because of their lying within the limits of the land grant aforesaid to the Burlington & Missouri River Railroad Company, and which lands at said time were subject only to entry and settlement under the homestead and pre-
emption laws of the United States and not such lands as were
4 granted to the State under and by virtue of said act of Congress approved March 4th, 1841, or any other law of the United States.

Your orator further shows that said respondents Jacob Reinhard and Frederick Fieser claim title to said real estate through deed from one David S. Grey and back through various mesne conveyances from the State of Nebraska, which the said respondents aver acquired the fee under said grant of land from the United States by said act of Congress approved September 4th, 1841; but your orator

alleges the fact to be that the said respondents nor either of them ever had possession of or occupied the said lands in any form whatever or any portion thereof; but allege that the said land prior to your orator's entry and settlement was wild and unimproved land.

Your orator is ignorant of the precise nature of the claim of said respondents except so far as the said respondents dispute the validity of your orator's title to said real estate by the commencement of a suit in ejectment against your orator for the recovery of the possession of said premises, which suit is now pending in the circuit court of the United States for the district of Nebraska, wherein the said Jacob Reinhard and the said Frederick Fiesner are plaintiffs and the said James M. Deweese, Jr., is defendant. Your orator shows to your honors that said action is at law and that your orator cannot in that action interpose the equitable defenses and obtain the equitable relief he is entitled to, as your honors will observe from this your orator's bill, save by the interposition of this honorable court.

Your orator avers that the said respondents by the commencement of said action at law and in other ways are contriving now to wrong and injure your orator in the premises by claiming to be the owners of said real estate and by trying to take and keep possession thereof and by denying and slandering your orator's title to and his right of possession thereof, all of which acts, doings and pretenses of the respondents are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator.

Whereupon your orator submits, forasmuch as he is without remedy save in this court, where matters of this and like nature are cognizable and relievable, that his title to said real estate be quieted by a decree of this court as against respondents and all persons claiming by, through and under them and adjudged to be perfect and valid against respondents and all persons claiming by, through and under them, and that said respondents and all persons claiming by, through or under them be forever enjoined and forbidden from in any manner injuring or hindering your orator in his title to or right of possession thereof, and that the said action at law in ejectment which is now pending, wherein these respondents are plaintiffs and your orator is defendant, in the circuit court of the United States for the district of Nebraska be stayed and held in abeyance until the decree is entered in this case, and that the said respondents, their agents and attorneys, be enjoined and restrained from prosecuting the said action at law in any manner until the decree of this court is rendered in this case.

To the end that respondents may show, if they can, why your orator should not have the relief hereby prayed and that they may show the nature of their adverse interests, claim and title which they assert to said real estate, and that they may to the best of their ability, knowledge, information and belief, full, true and direct answer make, but answer under oath is expressly waived, and that it be decreed that your orator's title to said real estate is perfect and valid as against the said respondents herein, and all persons claiming by, through and under them, and your orator's title to said

real estate be quieted in him and his right of possession assured by said decree; that said respondents be decreed to have no right, title or interest in and to said real estate, or that they took and now hold the same in trust for your orator, and that they shall by deed, in proper form, duly executed, convey said premises to your orator; that a restraining order be granted enjoining said respondents, their agents and attorneys from prosecuting said action at law now pending in the circuit court of the United States for the recovery of said premises, wherein the respondents herein are plaintiffs and your orator defendant, until the hearing and determination of this suit; that the said respondents be enjoined from in any manner injuring or hindering your orator in his title and possession of said real estate, and said respondents may be required to pay the costs of this suit, and that your orator may have decreed to him by your honors such other and further relief as the circumstances of the case may require and as is agreeable to equity.

May it please your honors to grant unto your orator the most gracious writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to Jacob Rheinhard and Frederick Fiesner, the said respondents, therein and thereby commanding them on a certain day and under a certain penalty to be therein inserted, that they personally be and appear before your
6 honors in this honorable court, then and there to answer the premises, and stand to, abide by and perform such order and decree therein as to this court shall seem proper and shall be agreeable to equity and good conscience. And your orator will ever pray.

MARQUETT, DEWEESE & HALL,
Solicitors for Complainant.
G. M. LAMBERTSON, *Of Counsel.*

UNITED STATES OF AMERICA, }
State of Nebraska, Saline County, } ss:

James M. Deweese, Junior, being first duly sworn, upon his oath says that he is the complainant in the above-entitled cause; that he has read the foregoing petition, knows the contents thereof, and that the facts therein stated are true.

JAMES M. DEWEESE, JR.

Subscribed in my presence and sworn to before me by the said James M. Deweese, Jr., this 4th day of October, A. D. 1888.

[SEAL.] SHANNON S. ALLEY,
Notary Public.

LEAVENWORTH, *Oct.* 6, 1888.

On reading the within bill it is ordered that the defendants, their agents and attorneys, show cause on the 3rd day of the next ensuing term of this court, why they should not be restrained from prosecuting their action at law, pending in the circuit court of the United States against the plaintiff for the recovery of the premises described

in the petition until the hearing and determination of this suit, or until the further order of the court, & in the meantime they are so restrained.

It is further ordered that in the event the defendants are not found in the district that service of this restraining order and the writ of subpœna be made on the attorneys for the defendants in said action at law.

(S'g'd) DAVID J. BREWER,
Circuit Judge.

Upon the back of said bill appear indorsements in words and figures following, to wit: No. 266 M. In the United States circuit court, district of Nebraska. James M. Deweese, Junior, *vs.* Jacob R. Rheinhard and Frederick Fieser. Bill of complaint. Filed Oct. 8, 1888. Elmer D. Frank, clerk.

7 Thereupon, afterwards, to wit: on the 15th day of January, 1880, answer was filed in said case; which said answer is in words and figures following to wit:

Answer.

In the Circuit Court of the United States, District of Nebraska.

JAMES M. DEWEESE, JUNIOR, Complainant,
vs.
JACOB REINHARD & FREDERICK FIESER, Respondents.

The answer of Jacob Reinhard and Frederick Fieser, defendants, to the bill of complaint of James M. Deweese, Jr., respondent.

These defendants now and at all times hereafter saving and reserving unto themselves the benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said complainant's said bill — complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants answering say:

They deny that said complainant is the owner of said premises described in said bill of complaint, and deny that he has been for more than five years past, or for any length of time whatever, in the exclusive, notorious and adverse possession of the following-described real estate, to wit: The northeast quarter of section 14, town. 5, range 3, east of the 6th P. M. situated in Saline county in the State of Nebraska.

And these defendants allege and aver that the value of said premises at the present time greatly exceeds $3,000, and den*ies* that the said plaintiff has any ownership, title, interest, claim, or possession to said real estate. Deny that the said lands above described lie in the limits of the grant of land of the Burlington &

Missouri River Railroad Company made by act of Congress dated July 7th, 1884, and deny that the said land was at all times mentioned in said complaint subject to entry and settlement under the homestead law of the United States. Deny that on the 31st of May, 1883, Barnard L. Castor entered and settled upon said lands and made an application in due and legal form to the register of the land office, at Beatrice, Nebraska, in the district of said office extending over said land in question. Deny that any entry was made upon said land by said Castor for the purpose of actual settlement and cultivation for himself. Deny that said com-
8 plainant complied in any respect with the rules and regulations of the law in regard to the manner of making homestead entries under the laws of the United States. Deny that said Castor tendered the amount of fees that was due for such filings as was required by law. Den*ies* that said complainant remained on said land for five years from the date stated in said complaint or during any period of such time whatever. Den*ies* that said Castor cultivated said land during the period required by law and under the rules and regulations of the Land Department or for any length of time whatever. Den*ies* that on the 6th day of July, 1888, said Castor made and tendered proof of two creditable witnesses or any witnesses that he resided upon and cultivated said lands for the peri*o*f of five years, or for any other length of time in the manner required by law and by the United States land office. Den*ies* upon information and belief that said complainant made oath before said register and receiver that he had not alienated said lands or any part thereof, and that he would bear true allegiance to the Government of the United States.

Den*ies* that said Castor tendered the fees required or made such proof or done any of the things necessary to *s*omply with the law relating to homestead and public lands.

And the defendants herein answering allege and aver that the said lands had been selected by the State of Nebraska under a land gran*d* made to said State for internal improvements by act of Congress approved September 4th, 1841, and that the same had been through mesne conveyances and for a valuable consideration, to wit: the sum of $1,500 conveyed to these defendants herein.

And these defendants in further answering aver, that under the act of Congress approved September 4th, 1841, Congress granted 5,000 acres of unappropriated public lands to aid in the construction of internal improvements in the State of Nebraska and that the selection of said lands including the lands herein described was made March 26th, 1868, which selection was subsequently approved on or about March —, 1870, the total amount so selected and approved — to less than 500,000 acres, and deny that the total amount so selected and approved amounted to 504,131.86 acres, and allege and aver that the lands so selected were authorized by law, and were subject to private entry at the date of said selection and prior thereto. And deny that the said lands were in the limits of the land grant of the Burlington & Missouri River railroad and subject

to entry and settlement only under the homestead and pre-emption laws of the United States.

9 And these defendants further say that the said respondents, Jacob Reinhard and Frederick Fiesner, claim title to said real estate through a deed from one David S. Gray and back through various mesne conveyances from said State of Nebraska which said respondents have acquired through fees under said grant of land from the United States by said act of Congress approved September 4th, 1841, and the selection of said lands by the State of Nebraska, and the patent thereto issued by the United States.

And your said respondents claim the legal title to said lands through mesne conveyances and a patent from the United States Government.

And your respondents in further answering say that the said lands in controversy were a part and parcel of the lands selected by the State of Nebraska, under the several acts of Congress relating thereto, and under the acts admitting the State of Nebraska into the Union for said lands being selected as a part of the internal-improvement lands granted to the State of Nebraska and said selection were approved by the Land Department of the United States and the patent issued therefor to said State of Nebraska, and by said State of Nebraska conveyed to the Midland Pacific Railway Company, and by them through mesne process to these respondents; that these claiming under the said State of Nebraska have for many years prior to any claim made or interposed by these plaintiffs paid the taxes upon said lands and they are the owners thereof; that in the administration of the Land Department of the United States and before any claim was set up, made, asserted or pretended to be made or asserted to the lands in controversy by said plaintiff, the Federal Government has patented said lands to the State of Nebraska and these defendants through mesne process held the title to said lands under patent and grant from the United States.

These respondents have become innocent purchasers for value paying therefor the sum of $1,500 long prior to any pretended claim of the said complainant, and that the decision of the said Land Department and the patent of the United States to these lands through which said respondents claim as innocent purchasers for value, ought not to be disturbed or set aside.

These respondents further answering say that said pretended application for homestead entry alleged to have been made by the plaintiff on the land involved herein, was rejected by the register and receiver of the land office at Beatrice, Nebraska, the district of which said office extended over the land in question. And

10 after said land officers had rejected complainant's pretended application, said complainant appealed as provided by law to the Commissioner of the General Land Office of the United States at Washington, who after consideration of the same affirmed the decision that had been made by the local land officers at Beatrice, Nebraska. That said complainant thereupon appealed said matter from this decision to the Secretary of the Interior of the Government of the United States, who after consideration of the same,

affirmed the decision made therein by the Commissioner of the General Land Office of the United States, whereby said pretended application of said complainant was wholly rejected.

And these defendants deny all, and all manner of unlawful combination and confederacy wherewith they or either of them is by said bill charged without this, that there is any other matter, cause or thing in the said bill of complainant's complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided and denied is true to the knowledge of these defendants or either of them, all which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and they humbly pray to be hence dismissed with such reasonable costs and charges in this behalf most wrongfully sustained.

O. P. MASON,
Counsel for Defendants.

Upon the back of said answer appear indorsements in words and figures following, to wit: No. 266 M. Deweese *vs.* Reinhard. Answer. Filed Jan. 15, 1889. Elmer D. Frank, clerk. Mason & Magoon, solicitors for resp't.

Thereupon, afterwards, to wit, on the 11th day of February, 1889, replication was filed in said case, which said replication is in words and figures following, to wit:

Replication.

In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

JAMES M. DEWEESE
vs.
JACOB REINHARD. } 266, M.

The replication of James M. Deweese, plaintiff, to the answer of Jacob Reinhard, defendant.

This repliant saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advan-
11 tage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say, that *they* will aver, maintain and prove his said bill of complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby, well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and

things this repliant is, and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly pray as in and by his said bill of complaint he has already prayed.

G. M. LAMBERTSON,
Solicitor for Plaintiff.

Upon the back of said replication appear indorsements in words and figures following, to wit: No. 266. Doc. M. U. S. circuit court, district of Nebraska. In equity. James M. Deweese *vs.* Jacob Reinhard. Replication. Filed Feb. 11, 1889. Elmer D. Frank, clerk. G. M. Lambertson, solicitor for plaintiff.

Thereupon, afterwards, to wit, on the 14th day of November, 1889, deposition on behalf of defendant- was received and opened by order of court October 29, 1892; which said depositions is in words and figures following, to wit:

Deposition de Bene Esse.

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. DEWEES, JR., Plaintiff,
vs.
JACOB REINHARD and FREDERICK FIESER, Defendant-.

Please take notice that the deposition- *de bene esse*, of Jacob Reinhard, Frederick Fieser and David S. Gray will be taken to be read in evidence at the trial of said cause, on the part of the respondents therein, before competent authority, at the office of Outhwaite, Linn & McNaghten, Board of Trade building, in Columbus, in the county of Franklin and State of Ohio, commencing on the 9th day of November, 1889, at the hour of 10 o'clock in the forenoon of said day, with authority to adjourn from day to day, till all such depositions shall have been completed, at which time and place you are hereby notified to be present and put interrogatories to the said witnesses, if you shall think fit.

12 The reason for taking the deposition- is that said witnesses lives at a greater distance than one hundred miles from Omaha, Nebraska, the place of trial of this action.

Dated at Lincoln, this 4th day of November, 1889.

O. P. MASON,
Solicitor for Respondents.

To G. M. Lambertson, solicitor for complainant.

Service of the above notice by receiving a copy thereof, on this 6th day of November, 1889, is admitted.

G. M. LAMBERTSON,
Sol. for Complainant.

Depositions of sundry witness- taken before me, H. F. Guerin, a notary public duly authorized and commissioned in and for Franklin county, State of Ohio, on the 9th day of November, in the year 1889, at the hour named, in and pursuant to the attached notice, at the office of Outhwaite, Linn & McNagten, Board of Trade building, city of Columbus, Franklin county, Ohio, to be read in evidence in behalf of the defendants in an action pending in the circuit court of the United States for the district of Nebraska, in which James M. Deweese, Jr., is plaintiff and Jacob Reinhard and Frederick Fieser are defendants.

Present on behalf of plaintiff: —— ——.
Present on behalf of defendants: Outhwaite, Linn & McNaghten.

JACOB REINHARD, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Question- by Mr. LINN:

1. State your name, age, residence, and occupation.

Ans. 1. My name is Jacob Reinhard; age, going on seventy-five years; Columbus, Ohio; by occupation an a banker.

Ques. 2. Are you the same Jacob Reinhard, the defendant in this action?

Ans. 2. I am.

The further taking of the depositions under the annexed notice was at this point adjourned until Monday, Nov. 11", 1889, at 10 o'clock a. m., for the following reasons:

1". That there was not sufficient time to complete the same.

2. That there were no other witnesses present.

H. F. GUERIN,
Notary Public in & for Franklin County, Ohio.

13 MONDAY, *Nov.* 17", 1889—10 o'clock a. m.

The further taking of the depositions under the annexed notice was at this time resumed in accordance with adjournment, as noted.

Present: Outhwaite, Linn & McNaughten, for def'ts; H. F. Guerin, notary public.

JACOB REINHARD, being further interrogated, testifies as follows:

Ques. 3. Do you know Mr. Frederick Fieser, a defendant in this case, and, if so, how long have you known him, and what were your business relations with him prior to Nov. 11', 1878?

Ans. 3. I know him; have known him about 48 years; he was connected with me in the banking business prior to that time.

Ques. 4. Did you and Mr. Fieser jointly purchase from Mr. D. S. Gray as trustee in 1878—in Nov., 1878—certain real estate in Saline county, Nebraska, described as follows: All of sec. 14, town. 5', range 3 E. of the 6th P. M., containing 640 acres according to the Government survey?

A. 4. Of Mr. D. S. Gray as trustee? Yes.

Ques. 5. What, if anything, did you and Mr. Fieser pay to D. S. Gray as trustee for said land?

Ans. 5. We paid D. S. Gray, as such trustee for said land, the sum of twelve dollars per acre, being in all seven thousand six hundred and eighty (7,680) dollars.

Ques. 6. If you know you can state whether or not that amount was the amount of the consideration expressed in the deed to you.

Ans. 6. That is my recollection.

Ques. 7. At the time of that purchase what knowledge of any sort did you have of a claim of James M. Deweese, Jr., to title to said lands or any portion thereof?

Ans. 7. I had none whatever.

Ques. 8. At the date of that purchase what knowledge, if any, did you have of said James M. Deweese, Jr., being in possession either by himself or agent of said lands or any portion of the same?

Ans. 8. I had none whatever.

Ques. 9. When did you first hear of any claim of said Deweese, Jr., to said land or any portion thereof?

Ans. 9. It was several years after the purchase; I couldn't give the exact date.

JACOB REINHARD.

14 FREDERICK FIESER, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, as hereinafter certified, deposeth and says as follows:

Question- by Mr. LINN:-

Ques. 1. State your name, age, residence, and occupation.

Ans. 1. My name is Frederick Fieser; am 74 years old; residence, Columbus, Ohio, and by occupation a banker.

Ques. 2. Are you the same Frederick Fieser who is a defendant in this case?

Ans. 2. Yes, sir.

Ques. 3. In 1878 did you and Mr. Jacob Reinhard, the codefendant in this case, purchase from D. S. Gray, as trustee, any lands in Saline county, Neb., and, if so, how much land and what was the description?

Ans. 3. Yes, sir; we purchased of him as such trustee all of sec. 14, town 5, range 3 E. of the 6" P. M., containing 640 acres according to the Government survey. This purchase was made, as I recollect, about Nov. 11", 1878.

Ques. 4. What was the price or consideration, if any, paid by you & Mr. Reinhard for said lands?

Ans. 4. We paid to D. S. Gray as trustee for said lands at the date of said purchase the sum of $12.00 per acre, being in all $7,680.00.

Ques. 5. At the date of said purchase what knowledge, if any, had you, or Mr. Reinhard, to your knowledge, of any claim of James M. Deweese, Jr., to title to said lands or any portion of the same?

Ans. 5. None whatever.

Ques. 6. What knowledge had you at that time or did Mr. Rein-

hard have, so far as you know, of any claim of said Deweese or any one for him to the possession of said land or any portion of the same?

Ans. 6. None whatever.

Ques. 7. When did you first hear of any claim of said Deweese or any one for him either to the title to or possession of said land or any portion of the same?

Ans. 7. Not for several years after the purchase.

FREDERICK FIESER.

DAVID S. GRAY, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, as hereinafter certified, deposeth and says as follows:

Questioned by Mr. LINN:

Ques. 1. State your name, age, residence, and occupation.

Ans. 1. My name is David S. Gray; Am 60 years old; residence, Columbus, Ohio, and by occupation an pres't of Clinton Nat. bank and trustee for J. N. Converse & Co.; also pres't of Col. & Eastern R. R., also Col., Shawnee and H. V. R. R.

15 Ques. 2. Do you know Mr. Jacob Reinhard and Mr. Frederick Fieser, defendants in this action?

Ans. Yes, sir; I know these gentlemen and have known them about 25 years.

Ques. 3. Did you convey to said defendants Mr. Jacob Reinhard & Frederick Fieser any lands in Saline Co., Neb., in 1878?

Ans. 3. Yes, sir; I did as trustee for J. N. Converse & Co., all of sec. 14, town 5, range 3, E. of 6th P. M., containing 640 acres according to the Government survey.

This conveyance is dated to the best of my recollection November 11", 1878.

Ques. 4. What was the price or consideration paid to you as such trustee by Messrs. Reinhard & Feiser for said land?

Ans. 4. As trustee I received $12 per acre, for the land conveyed to Messrs. Reinhard & Fieser as stated, being in all $7,680.

Ques. 5. At the time of said conveyance had you any knowledge of any claim of James M. Deweese, Jr., to title to said lands or any portion of the same?

Ans. 5. None whatever.

Ques. 6. Had you any knowledge at that time that said Deweese or any one for him was in possession of said lands or any portion thereof?

Ans. 6. No, sir.

Ques. 7. At the time of that conveyance what knowledge if any did you know either Mr. Reinhard or Mr. Fieser to possess of any claim of said Deweese either to the title to or possession of said lands or any portion of the same?

Ans. 7. None whatever; and I have every reason to believe that they had none whatever.

DAVID S. GRAY.

I, H. F. Guerin, a notary public in and for the county of Franklin, State of Ohio, do hereby certify that Jacob Reinhard, Frederick Feiser and David S. Gray were by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions by them respectively subscribed as above set forth, were reduced to writing by myself in the presence of the witnesses respectively, and were respectively subscribed by said witnesses in my presence and were taken at the time and place in the annexed notice specified; that I am not counsel, attorney or relative of either party, or otherwise interested in the event of the suit; that said depositions were commenced at the time in said notice specified and continued by adjournments from day to day as above stated.

16 In testimony whereof I have hereunto set my hand
[SEAL] and affixed my notarial seal this 11th day of November, A. D. 1889.

H. F. GUERIN,
Notary Public in and for Franklin County, Ohio.

Notary fees, $4.68.
Paid by defendants.

H. F. GUERIN.

Upon the back of said depositions appear indorsements in words and figures following, to wit: No. 266 M. Rec'd Nov. 14, '89, and opened by order of court Oct. 29, '92. E. D. Frank, clerk.

Thereupon, afterwards, to wit, at the May term of said court, on the 12th day of May, 1892, the following proceedings were had and done in said cause as appears of record on folio 419, Journal "Q," of said court, to wit:

Order of Revivor.

JAMES M. DEWEESE, JR., Complainant,
vs.
JACOB R. REINHARD *et al.*, Defendants. } 266 M.

It appearing to the court on this May 12th, 1892, by agreement of parties, that the defendant herein Frederick Fieser, since the institution of his action, died a resident and citizen of Franklin county, in the State of Ohio, and left as his sole heirs-at-law and devisees, his wife Louisa Fisher, and his two children Louis F. Fieser and Bertha M. Kraus, wife of George C. Krause, and that his said heirs-at-law and devisees, then were, ever since have been and still are citizens and residents of said Franklin county, State of Ohio, and that the complainant's right of action, as set out in his bill of complaint herein, survives against said heirs-at-law and devisees of said Frederick Fieser.

It is thereupon, in accordance with the stipulation of the parties filed in this court in an action at law, wherein Jacob R. Reinhard and others are plaintiffs and James M. Deweese, Jr., and others are defendants, the same being docket K, number 149, hereby ordered

and adjudged that this action be and the same is hereby revived as to the defendant Frederick Fieser, deceased, against said Louisa Fieser, Louis F. Fieser, Bertha M. Kraus and George C. Kraus, and thereupon the said Louisa Fieser, Louis F. Fieser, Bertha M.
17 Kraus and George C. Kraus, each and all of them, waive the service of subpœna herein and enter their voluntary appearance in this action, and it is ordered that the answer of the said Frederick Fieser in this action stand and remain as the answer of his said heirs-at-law and devisees, the said Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus, and that this action proceed to trial as if originally instituted against the said Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus as joint defendants with the defendant Jacob R. Reingard.

(S'g'd) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to wit, on the 14th day of December, 1892, testimony on behalf of complainant was filed in said case, which said testimony is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAS. M. DEWEESE, JR., Plaintiff,
vs.
JACOB R. REINHARD *et al.*, Respondents.

Testimony of Tobias Castor, Bernard L. Castor, Elmer Castor, Wm. H. Clark, Jas. M. Deweese, Jr., U. G. Deweese, Chas. H. Dunning, Hiram W. Parker, L. O. Westcott, and C. J. Ernst in behalf of plaintiffs, and F. H. Coney in behalf of respondents, taking at Omaha and Lincoln, Nebraska, on Nov. 21st and 29th, 1892, before E. S. Dundy, Jr., examiner in chancery.

Appearances.

For plaintiffs, G. M. Lambertson and J. W. Deweese.
For respondents, Chas. Offutt and C. E. Magoon.

By agreement of the parties the witnesses, Wm. H. Clark, Chas. H. Dunning, L. O. Westcott, C. J. Ernst, and F. H. Coney were sworn by C. E. Magoon, notary public in and for Lancaster county, Nebraska.

JAMES N. DEWEESE, JR., being first duly sworn, testified on behalf of plaintiff as follows, viz:

Examined in chief by Mr. LAMBERTSON:

Q. State your name, age, residence and business.
A. Jas. M. Deweese, Jr.; age, 31; residence, Swanton, Nebraska; business, farming.
18 Q. Is Swanton your post-office address?
A. Yes, sir.
Q. Describe the numbers of the land on which you reside.

A. It is the northeast quarter of section fourteen, town. five, range three east.
Q. What county?
A. Saline county, Nebraska.
Q. You are the plaintiff in this case, are you?
A. Yes, sir.
Q. When did you first settle on the land you have described?
A. It was in June, 1883.
Q. How old were you at that time?
A. Twenty-two years old.
Q. Were you a citizen of the United States?
A. Yes, sir.
Q. Natural-born or naturalized?
A. Natural-born.
Q. Have you ever taken any other homestead or pre-empted land under the laws of the United States?
A. No, sir.
—. Did you make a declaratory statement on filing on this land? If so, state when.

Objected to as incompetent, immaterial and not the best evidence.

A. I do not believe I understand.

By Mr. LAMBERTSON: Read the question.
Question read, "Did you make a declaratory statement on filing on this land? of so, state when.

Objected to as incompetent, immaterial and not the best evidence.

A. I think it was on the 31st day of May, 1883.
Q. What kind of a filing was it?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.

A. Homestead filing.
Q. In what land office did you make that filing?
A. It was at Beatrice, Nebraska.
Q. Do you know who the land officers were at that time?
A. Mr. Parker was one.
Q. H. W. Parker?
A. Yes, sir.
Q. Was the register of the land office?
A. Yes, sir.
Q. Register of the United States land office?
A. Yes; he was register.
Q. Did you make an application at the date you have fixed to enter this land as a homestead?

Objected to as incompetent and not the best evidence.

A. Yes, sir.
19 Q. What amount of fees did you tender?

Objected to as leading.

A. I offered $20.00.
Q. Did they tell you what the fees were?
A. Yes, sir.
Q. Did you tender more than the fees required by law?

Objected to as incompetent and asking for the conclusion of the witness, and leading.

A. That is what I understood.
Q. What was done with the application?

Object- to as incompetent and not the best evidence.

A. It was rejected.
Q. What became of the papers and the application itself, were they retained by the register or were they returned to you?
A. They were retained by the register.
Q. Register of the land office?
A. Yes, register of the land office.
Q. But your application was rejected?

Objected to as incompetent, not the best evidence and leading.

A. Yes, sir.
Q. Now what did you do, did you abide by that decision?

Objected to as incompetent and immaterial.

A. No, sir.
Q. What did you do?

Objected to as incompetent, immaterial and not the best evidence.

A. Took an appeal.
Q. To whom?

Objected to as incompetent, immaterial and not the best evidence.

A. To the Land Commissioner of the General Land Office of the United States.
Q. Do you know what his decision was?

Objected to as incompetent, immaterial and not the best evidence.

A. He rejected it, I believe.
20 Q. And what did you do then?

Objected to as incompetent, immaterial and not the best evidence.

A. It was appealed to the Secretary of the Interior.
Q. And what did he decide?

Objected to as incompetent, immaterial and not the best evidence.

A. He rejected it.
Q. Affirmed the decision of the register and also the Commissioner of the General Land Office?
A. Yes, sir.
Q. How long have you resided on that land?
A. Since June, 1883.
Q. State what you did immediately when you went on it, and

what you have done since—what improvements, if any, you have made.

Objected to as immaterial and irrelevant.

A. The first thing I did was to build a house and then proceeded to cultivate the farm.

Q. What kind of a house? Describe as near as you can all about the improvements you made.

Objected to as immaterial and irrelevant.

A. I built a house, first /12 by 14, frame house, and then broke prairie and got the farm in general cultivation.

Q. How much land have you broken upon it?

Objected to as immaterial and irrelevant.

A. There are 12i acres broken.

Q. How much of that land was broken before the five years had elapsed after you first settled upon it?

Objected to as immaterial and irrelevant.

A. Ninety acres.

Q. Ninety acres broken at that time?

Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. What other improvements were put on it up to the date of the expiration of the five years from the time you settled on it?

Objected to as immaterial and irrelevant.

A. Pasture, barn, well, hen-house and outbuildings.

21 Q. Did you build any other house busides this 12 by 14?

Objected to as immaterial and irrelevant.

A. I put on an addition.

Q. What were the dimensions of the addition?

Objected to as immaterial and irrelevant.

A. I first put on an 8 by 12; that was all that was on up to the five years; I have put on an addition since then.

Q. Have you lived there continuously up to the present time?

Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. On the land?

Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. Have you a family?

Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. Of what does your family consist?

Objected to as immaterial and irrelevant.

A. Wife and four children.
Q. What was the date of your marriage?

Objected to as immaterial and irrelevant.

A. October 14, 1885.
Q. Was any fencing put around the land or any part of it, was it fenced with wire fence or fence of any kind?

Objected to as immaterial, incompetent, irrelevant and leading.

A. There is a pasture fenced, wire fence, a part of the farm was fenced.
Q. Did you put that on?

Objected to as immaterial, incompetent, irrelevant and leading.

A. Yes, sir.
Q. Have you planted any trees on the land?

Objected to as immaterial, incompetent, irrelevant and leadings.

A. Yes, sir.
22 Q. Tell what kind of trees, and how many, as near as you can.

Objected to as immaterial, incompetent, irrelevant and leading.

A. I would like to understand the difference. Do you mean before the five years, or at the present time.
Q. Up to the present time?

Objected to as immaterial, incompetent, irrelevant and leading.

A. I have about 250 fruit trees at present.
Q. How long have they been planted?
A. Different periods, from one to seven years. Forest trees I have about five hundred.
Q. When were they put on there?

Objected to as immaterial, incompetent, irrelevant and leading.

A. From one to eight years.
Q. Are those all the improvements you have made upon the place?

Objected to as incompetent, immaterial, irrelevant and leading.

A. Yes, sir.

Q. Have you sold or conveyed or alienated any part of the land?
Objected to as incompetent, immaterial, irrelevant and leading.

A. No, sir.
Q. Did you buy it for yourself, settle on it for yourself?

Objected to as leading.

A. Yes, sir, for my own use.
Q. Where did you live at the time you settled upon this land, and what was your occupation?

Objected to as leading.

A. My home was in Richardson county, Nebraska; occupation, farming.

Q. Have you a windmill on the premises, attached to the well?

Objected to as immaterial, irrelevant, and leading.

A. Yes, sir.

23 Q. What is the character of this land, is it timber, mountainous, prairie, grazing or ordinary agricultural land?

Objected to as immaterial and irrelevant.

A. It is ordinary agricultural land.

Q. Is it timber, or mountainous or prairie?

Objected to as immaterial and irrelevant.

A. Prairie.

Q. Is the land valuable for coal, iron or minerals of any kind?

Objected to as immaterial and irrelevant.

A. No, sir.

Q. Have you resided or boarded elsewhere than on the land since you commenced your residence thereon? If so state when and where and how often.

Objected to as immaterial and irrelevant.

A. I was absent from the place about between three and four months.

Q. What were you doing at that time?

Objected to as immaterial and irrelevant.

A. I was earning money to go ahead and improve the place.

Q. Was that three or four months at one time or at different times?

Objected to as immaterial and irrelevant.

A. That was at one time.

Q. Has your family resided with you on the lands?

Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. Has your family been on the land with you ever since you have been married?

Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. What is the value of the house on the lands?

Objected to as immaterial and irrelevant and the witness not having shown himself qualified to answer.

A. At the present about $250.00.

24 Q. Is it one or two stories?

Objected to as immaterial and irrelevant.

A. One story.
Q. Have you a stable?

Objected to as immaterial, irrelevant and leading.

A. Yes, sir.
Q. What is the value of that?

Objected to as immaterial, irrelevant, and the witness not having shown himself qualified to answer.

A. $200.00.
Q. What is the value of your well and windmill?

Objected to as immaterial, irrelevant and the witness not having shown himself qualified to answer.

A. Including the windmill, $150.00.
Q. What is the value of your orchard?

Objected to as immaterial, irrelevant and the witness not having shown himself qualified to answer.

A. $300.00.
Q. What is the value of the other trees upon the land?

Objected to as immaterial and irrelevant, the witness not having shown himself qualified to answer.

A. $150.00.
Q. And the 120 acres broken, what is the fair valuation of breaking and cultivating that land?

Objected to as immaterial and irrelevant, the witness not having shown himself qualified to answer.

A. $4.00 per acre.
Q. What is the value of the fencing?

Objected to as immaterial, irrelevant, the witness not having shown himself qualified to answer.

A. $200.00.
Q. What, in your judgment, is the total value of all the improvements on the land at the present time?

Objected to as immaterial and irrelevant, the witness not having shown himself qualified to answer.

A. From $1,600 to $1,800.
Q. What were they at the time you tendered your final proof?

25 Objected to as immaterial and irrelevant, the witness not having shown himself qualified to answer.

A. About $600.00.
Q. Describe as near as you can what farming implements you own and use on the farm.
A. Binder, press-drill, lister, cultivator, harrow, stirring plow, mower, rake.

Q. Any wagon?

Objected to as immaterial and irrelevant.

A. Wagon and buggy.

Q. What animals and stock have you, describe them, give their number, commencing with horses?

Objected to as immaterial and irrelevant.

A. Six head of horses, cattle, 21 head; twelve head of hogs; 150 chickens.

Q. Describe as near as you can the articles of furniture you have on the place, general household furniture.

Objected to as immaterial and irrelevant.

A. Stoves, chairs and tables; beds, cupboard, bookcase.

Q. How much of the land is in cultivation this year?

Objected to as immaterial and irrelevant.

A. One hundred and ten acres, that leaves out about ten acres for the grove and orchard.

Q. Have you put any mortgage of any kind on the land?

A. No, sir.

Q. Did you make this entry in the interest of or for the benefit of any one else, or has any other person other than your family or yourself any interest, immediate or prospective, in this entry?

Objected to as immaterial and irrelevant and assuming that there was an entry.

A. No, sir, the entry was for the use of myself.

Q. Did you make this entry in good faith, for the exclusive purpose of a home and farm for yourself and family?

Objected to as immaterial and irrelevant and assuming that there was an entry.

A. I did.

Q. State whether or not you tendered final proof to the register of the United States land office at Lincoln, Nebraska, on this homestead. If so, state when.

26 Objected to as immaterial, irrelevant and incompetent, calling for the conclusion of the witness, and not the best evidence.

A. Yes, sir; we made final proof July 6, 1888.

Respondents move to strike out the answer as not the best evidence.

Q. I will ask you to look at this paper, and state whether or not this is the final proof.

Objected to as calling for a conclusion.

A. Yes, sir.

Q. State whose signature this is attached to the paper marked "No. 1, Homestead," bearing date May 22, 1888.

A. That is my signature.

Q. Whose signature is this attached to the paper marked or headed "Homestead. Proof and final affidavit required of homestead claimants," purporting to have been sworn to July 6, 1888?

A. That is my signature.

Q. Whose signature is this attached to the paper entitled "Homestead, pre-emption and commutation proof"?

A. Christopher Young.

Q. Do you know his handwriting?

A. Yes, sir.

Q. You know that to be his genuine signature?

A. Yes, sir.

Q. Are you acquainted with the signature of Joseph L. Hubbell?

A. Yes, sir.

Q. Whose signature is that attached to the paper marked "Homestead, pre-emption and commutation proof"?

A. Joseph L. Hubbell.

Q. Did you see each one of these witnesses sign the papers?

A. Yes, sir.

Q. Whose signature is this attached to the paper marked "Homestead, pre-emption and commutation proof, testimony of claimant," and purporting to be signed by Jas. M. Deweese, Jr., on the 6th day of July, 1888?

A. That is my signature.

Q. Where did these two witnesses reside?

A. Swanton, Saline county, Nebraska.

Q. Were they acquainted with the length of residence and the improvements, and time you had resided on the place, and all the matters upon which you testified?

Objected to as calling for facts not within the knowledge of the witness and incompetent.

Q. State whether or not the facts set forth in the final proof as made by you and signed and sworn to by you are correct and true as therein set forth.

27 Objected to as leading, immaterial and irrelevant.

A. Yes, they were.

Q. State whether or not the matters sworn to and set forth in the affidavits of the two witnesses, Christopher Young and Joseph L. Hubbell, are to your knowledge true and correct.

Objected to as leading, immaterial and irrelevant.

A. Yes, sir.

Q. Did you make, at the time you tendered this final proof, did you tender any fees with it?

Objected to as immaterial, irrelevant and leading.

A. All the fees they took was the register, whoever it was that

wrote them out, he just took out the writing, amounted to about $4.50 I think.

Q. Did you, at the time you made tender of the final proof, pay all the fees?

Objected to as immaterial, incompetent and leading.

A. No, sir.

Q. Did you tender them?

Objected to as immaterial, incompetent and leading.

A. Yes, sir.

Q. How much of this fee was accepted?

A. About four dollars.

Q. Where was that final proof made?

A. Lincoln, Nebraska.

Q. Who was the register and receiver, do you know?

A. No, I do not remember the names.

Q. Did you see the T. B. Davis, register, sign the paper purporting to have been signed by him on July 6, 1888, rejecting the proof.

A. I do not believe I did.

Q. You are not acquainted with his handwriting?

A. No, sir.

Q. Was the proof accepted or rejected?

Objected to as incompetent and irrelevant and not the best evidence.

A. It was rejected.

Plaintiff now offer- in evidence the final proof before the register and receiver of the United States land office at Lincoln, Nebraska, tendered on July 6, 1888, to which the testimony of the witness has been directed, consisting of ten pages, including the publication of the notice, and the proof of publication, together with the certificate of the register rejecting the application and asking the same to be attached and made a part of the testimony and evidence of the witness.

28 Said papers of final proof are marked Exhibit "A," and attached hereto.

Respondents object to the introduction of Exhibit "A," as immaterial, incompetent and irrelevant, there not having been anything to show the authority to file said papers, and the said papers being irregular and improper in form, insufficient in proof, and the proper publication not having been made.

Cross-examination.

By Mr. MAGOON:

Q. You are the complainant in this action, are you?

A. Yes, sir.

Q. When did you build a house on the land involved herein?

A. It was in June, 1883.

Q. On what day of the month did you commence its erection?
A. I could not tell you exactly, but it was about the 18th or 19th day of June.
Q. How long did it take you to erect this first house?
A. Two days, I believe.
Q. When did you move into it?
A. In July.
Q. Of that year?
A. Yes, sir.
Q. The year 1883?
A. Yes, sir.
Q. How long did you remain in that house?
A. In that house I resided until 1885.
Q. What month?
A. April.
Q. How long have you resided on that land?
A. I have resided on that land ever since June or July, 1883.
Q. Have you at any time been absent from that land?
A. I was absent about three or four months in 1883 or 1884, from November, 1883, until February, 1884.
Q. Where were you at that time?
A. I was in Richardson county, Nebraska.
Q. And you returned to Saline county during what month?
A. I believe in February, 1884.
Q. Was it not as late as the month of April, 1884?
A. No, sir.
Q. What were you doing in Richardson county?
A. I was working for money to improve the land.
Q. For whom were you working?
A. Different parties, not all the time at one place.
Q. Name who they were.
A. I was working for Thos. Draper and Harvey Belden, and I was also working for my father part of the time.
Q. What is his name?
A. Jas. M. Deweese.
29 Q. What were you doing?
A. Husking corn and chopping wood.
Q. Anything else?
A. General farm work.
Q. Now state positively the month that you returned to the north-east quarter of section fourteen, town. five, range three, located in Saline county, Nebraska, in the year 1884.
A. I believe it was the last of February.
Q. Can you testify with any more positiveness than simply in your belief?
A. No sir.
Q. Now when were you next absent from this land?
A. I have never been absent since then except just a few days at a time.
Q. There has been no continued absence from this quarter section of land on your part since that date?

A. No sir.
Q. When did you first see this land?
A. It was the first of June, 1883.
Q. Who called your attention to this land?
A. Well, that is a question I do not know that I could exactly answer.
Q. Answer it the best you can.
A. Well, my brother told me there was a section down there that he believed I could get a homestead on.
Q. What was your brother's name?
A. J. W. Deweese.
Q. This gentleman here representing you as an attorney?
A. Yes, sir.
Q. Did you go and look at the land then?
A. No, sir.
Q. When did you first go and look it it?
A. The first of June, some time about the first of June, 1883.
Q. What did you do then in regard to this land? What is the next thing you did after looking at it?
A. I built a house some time in June.
Q. And what was the next thing you did?
A. After moving in it I broke some prairie.
Q. And what was the next?
A. I built a stable.
Q. And what was the next?
A. I continued to improve it at different times, or all the time, as I saw fit.
Q. Now what, if anything, did your brother tell you about any person claiming any rights in that land?
A. He said there was a claim against it, but he did not think the claim was legal.
Q. Who did he say made the claim against it?
A. He gave no names.
Q. Didn't he give any names?
A. No.
Q. Didn't he tell you the Midland Pacific Railway Co. made some claim against it?
30 A. I believe he said they had an original claim, or it was through them a man had a claim.
Q. Some man has a claim against it through the Midland Pacific Railway Co.?
A. That was the way I understood it.
Q. Did he say anything about the State of Nebraska having a claim on that land?
A. He said they had a claim, but it had been rejected.
Q. The State's claim had been rejected?
A. Yes, sir.
Q. Did he say anything about Joel N. Converse & Co. making claim to the land?
A. No, sir.

Q. Did he say anything about David S. Gray, trustee, making claim to the land?

A. No, sir.

Q. Did he say anything about the defendants in this case making claim?

A. No sir, not by name.

Q. Did you go to the records and look this up?

A. My brother as attorney did.

Q. He looked it up for you?

A. Yes, sir.

Q. That was before you moved on the land?

A. Yes, sir.

Q. Before you went to Beatrice to the land office there?

A. Yes, sir.

Q. He looked it up and advised you as to the character of the claims?

A. Yes, sir.

Q. He told you what, in his judgment, the condition of the claim was?

A. Yes, he considered it homestead land.

Q. Now what was the condition of that land when you first entered the land?

A. It was raw praisie.

Q. Any improvements whatever?

A. No, sir.

Q. Any breaking whatever?

A. No, sir.

Q. No improvements of any kind or character?

A. None whatever.

Q. Did you investigate the question as to whether anybody had paid the taxes on this land?

A. No, sir; I did not.

Q. Do you know whether your brother as attorney did so?

A. I do not know.

Q. Don't know whether he looked it up or not?

A. No, sir.

Re-examination.

By Mr. DEWEESE:

Q. What did you mean by saying that you were absent a few days at a time since you moved onto the land?

A. Well, I would go visiting once in a while and stay three or four days, or I would have business out of the county that would call me away for three or four days, but there was no time I was away from the land over ten days at a time, except that one time for three or four months.

31 Q. When you were thus away temporarily visiting or on business was this still your home or where your family stayed?

A. Yes, sir.

JAMES M. DEWEESE, JR.

TOBIAS CASTOR, being first duly sworn, testified in behalf of plaintiff as follows, viz:

Examined in chief.

By Mr. LAMBERTSON:

Q. Mr. Castor, what is your first name?
A. Tobias.
Q. Where do you reside?
A. I reside now in Lincoln.
Q. Were you present at the time the final proof was made or tendered at the United States land office by Mr. Deweese?
A. At Lincoln?
Q. Yes, sir.
A. Yes, sir.
Q. Are you acquainted with the signature of Mr. Davis?
A. Yes, sir.
Q. Who is he?
A. He was the register of the United States land office at the time this proof was tendered.
Q. And who was the receiver?
A. I think Mr. Hudson was the receiver.
Q. Was the final proof accepted or rejected?

Objected to as not the best evidence.

A. It was rejected.
Q. Are you acquainted with the signature of Mr. Davis?
A. Yes, sir.
Q. I will ask you to look at this paper purporting to be signed by T. B. Davis, register, of date July 6, 1888, also the certificate of the register as to posting notice, purporting to be signed by T. B. Davis, register, and state whose signature it is.
A. It is Mr. Davis' signature; I think I was present when he signed it.
Q. Did you see him write the disallowance of the final proof?

Objected to as leading and immaterial.

A. I think I was present when the papers were closed in.
Q. Do you know this to be the identical papers on which proof was tendered at that time?

Objected to as leading and immaterial.

A. Yes, sir.
Q. Mr. Castor, have you any knowledge of the original filing upon this property?
32 A. I was present when the attempt was made to file on the lands described in this proof.
Q. State, if you can, what was done, as near as you remember.

Objected to as incompetent, irrelevant and immaterial.

A. If I remember right the application was made for homestead

entries by Mr. Deweese on the land described in this paper here, and he tendered the fees to the officials at the land office at Beatrice, Nebraska, and they rejected the entry.

Q. Was the usual affidavit made?

Objected to as leading and not the best evidence.

A. Yes, all the usual papers were made.

Q. What became of those papers, do you know?

A. I think they were forwarded to the General Land Office at Washington when they appealed from the decision of the register of the United States land office.

Q. You stated the fees were tendered?

A. Yes, sir.

Q. What in your opinion is the value of the improvements on that land?

Objected to as incompetent, immaterial and irrelevant.

A. I could not say; I have not been out there for several years and I do not know.

Q. Do you know whether Mr. Deweese resided on that continuously?

Objected to as leading.

A. Yes, he has been a resident on there since a short time after his application for homestead was made.

Q. Lived there continuously and improved it?

A. Yes, sir.

Cross-examination.

By Mr. MAGOON:

Q. When did you first see the northeast quarter, section 14, town. 5, range 3, Saline county?

A. Twenty-five or thirty years ago.

Q. Did you see this on or about the date of May 31, 1883?

A. Yes, sir.

Q. What was the character of this quarter section as regards improvements?

A. No improvements whatever.

Q. Raw prairie?

A. Yes, sir.

Q. Unimproved in any kind or way?

A. No, sir. No improvements.

TOBIAS CASTOR.

33 HIRAM W. PARKER, being first duly sworn, testified as follows, viz:

Examined in chief.

By Mr. LAMBERTSON:

Q. Where do you reside?

A. Beatrice, Nebraska.

Q. What is your business?
A. Just at this time I have no special business.
Q. How long have you lived in Beatrice?
A. I have lived there since 1871 continuously.
Q. What is your age?
A. I am 65.
Q. Were you at one time register of the land office at Beatrice, and if so, between what dates?
A. I was register there, took possession of the office July 1, 1871; I held the office about 13 years; I think twelve years and nine months; I think I went out the first of April, 1884.
Q. Were you the register of the land office in 1883?
A. Yes, sir.
Q. Do you remember of an application having been made to enter as a homestead the quarter sections in section 14, township 5, range 3 east, in Saline county?

Objected to as immaterial, incompetent, irrelevant and not the best evidence.

A. I do, yes, sir.
Q. Do you remember Jas. M. Deweese, Jr., filing an application for a homestead?

Objected to as incompetent, irrelevant and immaterial and leading.

A. I do.
Q. Also Bernard Castor?
A. Yes, sir.
Q. State whether the applications were made in the usual form.

Objected to as incompetent, immaterial, irrelevant and —.

A. The applications and affidavits were made in the required legal form, the usual form.
Q. State whether or not any fees were tendered.

Objected to as incompetent, immaterial, irrelevant and leading.

A. There were.
Q. The fees required by law?

34 Objected to as leading, immaterial, incompetent and irrelevant.

A. Yes, sir.
Q. What became of that application?

Objected to as incompetent, immaterial and not the best evidence.

A. I rejected the applications.
Q. What did you do with the applications?

Objected to as incompetent, immaterial and not the best evidence.

A. They took an appeal from any decision in rejecting the applications appealed to the Commissioner of the General Land Office; I transmitted the applications with their appeals to the Commissioner of the General Land Office.

Q. And did you transmit all these applications and papers with that appeal?

A. Yes, the affidavits and their appeal, they appealed from my decision.

Q. On what ground did you reject the application?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.

A. The land had been withdrawn from market, not subject to disposal; I cannot tell you what date, but it was withdrawn and I had no authority to dispose of the land.

Q. Had not the ground already been selected by the State under the internal-improvement grant of 1841?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.

A. That was the grant, I cannot tell you what date.

Q. Was it rejected on any other ground, for instance, for irregularity of the papers?

Same objection.

A. No, sir. Everything was all right; that was the only ground on which it was rejected; it was marked on the plat as "State selection."

—. Do you know to whom sections 13 and 15 on either side of this section 14 belonged or had been granted as appeared by the maps and official plats on file in your office as register of the land office at that time, if so, state?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.

35 A. According to the official records in my office they belong to the B. & M. R. R. Co.

Q. What do you mean by "B. & M."?

A. Burlington & Missouri River Railroad in Nebraska; the land was granted to them by act of Congress.

Q. Have you examined the plats and maps and diagrams, I mean official plats and diagrams, on file in the United States land office at Beatrice, Nebraska, so as to be able to state whether or not this section fourteen, town. five, range three east was within the limits of the B. & M. River Railroad Company land grant? If so, state.

Objected to by defendants as immaterial, irrelevant, incompetent, not the best evidence and calling for the conclusion of the witness.

A. Yes, sir; my answer is that the plats and records in the land office showed it was within the limits of the Burlington and Missouri River Railroad Co. land grant.

Q. Are you acquainted with the handwriting and signature of L. Harrison?

A. Yes, sir, somewhat.

Q. As register of the land office, from time to time did you receive letters from him, or see his signature upon official papers?

A. I have seen his signature very frequently; I am acquainted with his signature.

Q. I will ask you to look at this letter dated June 8, 1883, purporting to have been addressed to J. W. Deweese, signed by L. Harrison, and state whether or not that is his signature.

A. Yes, that I am very positive is his signature; it looks just like it; I have seen it a great many times, and it is his signature undoubtedly.

The plaintiffs now offer the letter referred to, which is marked Exhibit "B" and made a part hereof.

Respondents objects to the introduction of the letter marked Exhibit "B" on the ground that it is incompetent, irrelevant and no foundation has been laid for its introduction.

Q. In rejecting these applications to enter these lands as homesteads by James M. Deweese, Jr., and Bernard Castor, did you make any entry upon the face of the papers stating the rejection or the reasons for rejection?

Objected to as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, wrote across the face in red ink, "Rejected," giving reasons why rejected and signed it officially.

36 Cross-examination.

By Mr. MAGOON:

Q. The applications made to you relative to the lands embraced in — 14, township 5, range 3 east, Saline county, Nebraska, were in writing, were they not?

A. They were on blanks the Government furnished, partly written and partly printed, the description of the land filled in, and the names filled in; the Government furnished blanks for all kinds of entries; this was a homestead blank, partly written and partly printed.

Q. These blanks were preserved?

A. They were sent to the Commissioner of the General Land Office at Washington.

Q. Do you know what became of them?

A. No, only that they were mailed to the Commissioner of the General Land Office.

Q. Did you ever see those blanks afterwards?

A. I cannot recollect now that I saw them.

Q. For aught you know they are in Washington yet?

A. For aught I know; I do not mind now ever seeing them; I do not think they were ever returned; I do not know.

HIRAM W. PARKER.

Complainants now offer copies of the applications for filing of homestead entries, the affidavits relating thereto, the rejection of the same on the face thereof, and the decisions relating to such home-

stead filings that were made by the Commissioner of the General Land Office of the United States and the Secretary of the Interior, the same being duly certified to on the date of May 25, 1889, by S. M. Stockslager, Commissioner of the General Land Office; which are accordingly marked Exhibit "C" and attached hereto.

Objected to by def'ts as incompetent, immaterial and irrelevant.

Respondents now offer in evidence lists of land selected in the Brownville now Beatrice district of the State of Nebraska, which have been selected for the State of Nebraska, including all of sec. 14, town. 5, range 3 east and approved by the Commissioner of the Land Department and the Secretary of the Interior of the United States, which list or copy of the same is attached to the papers certified to by the said Commissioner of the General Land Office. Said list is attached hereto, marked Exhibit "C½."

Complainants object to the introduction of the last page of said transcript as incompetent, immaterial and irrelevant.

37 Complainant also offers in evidence a copy of the diagram, with all the indorsements thereon, and entries showing the limit of the land grant of the B. & M. River Railroad Company, and the original location of the line of that road, and the subsequent change of location, duly certified by W. M. Stone, acting Commissioner of the General Land Office of the United States, under date of Aug. 17, 1889; said diagram is marked Exhibit "D" and attached hereto.

Respondents object to the introduction of Exhibit "D" for the reason that the same is incompetent, irrelevant and immaterial, that — is not the best evidence, and no foundation has been laid for its introduction.

It is hereby stipulated that so much of the testimony taken in the above-entitled case of Jas. M. Deweese, Jr., *vs.* Jacob Reinhard, Frederick Fieser, and the parties defendants in whose names said action is revived, as either party may desire to use, when written out, signed and subscribed by the witnesses and filed in said case, may be used and filed in and read and considered on the hearing of the case of Bernard L. Castor *vs.* the same defendants named above, and may be incorporated into the bill of exceptions and transcript in the event of an appeal being taken of said actions or suits; and it is further agreed that the testimony taken in the above-entitled case may be filed in both of said cases, and have the same force and effect as if taken in both cases, subject at all times to the exceptions and objections made.

U. G. DEWEESE, being duly sworn, testified as follows, to wit:

By Mr. LAMBERTSON:

Q. Where do you reside?
A. At Harbine & Farming.
Q. What is your business?
A. Insurance.
Q. You know Jas. M. Deweese, Jr.?

A. Yes, sir.
Q. Are you related to him?
A. Yes, sir.
Q. Is he your brother?
A. Yes, sir.
Q. Do you know of his having settled on the northeast quarter of section 14, town. 5, range three?
A. Yes, sir.
Q. What time did he settle there?

Objected to as incompetent, immaterial and irrelevant.

A. He settled there in the year 1883.
Q. Do you know how long he has resided there? If so, state.

Objected to as incompetent, irrelevant and immaterial.

A. He has resided there ever since.
38 Q. You may state whether or not he had any family; and, if so, state how much of a family, and whether the family resided on the land during any portion of the time he was there?

Objected to as leading, incompetent, immaterial and irrelevant.

A. He hadn't any family when he went there; he has a family now, and they have lived there; he has raised a family there.
Q. How many children has he?

Objected to as immaterial and irrelevant.

A. Four children now.
Q. Do you know what portion of the time since he was married his family have been with him on that land?

Objected to as immaterial and irrelevant.

A. He was married in 1885; they have been with him ever since.
Q. State whether or not he has made any improvements on that land up to July 6, 1888; and, if he has, state what they consist of.

Objected to as incompetent, immaterial and irrelevant.

A. Yes; he had considerable broken out, and fencing, a house, barn, well and an orchard.
Q. How much land has been broken out?

Objected to as incompetent and immaterial.

A. At the present time there is about 120 or 125 acres.
Q. How much was there July 6, 1888, if you know?

Objected to as incompetent, immaterial, irrelevant.

A. I could not tell you; I should judge at that time there was probably 80 acres broken out.
Q. State whether or not, if you know, he has resided continuously upon that land from the time he entered thereon and settled thereon up to the time he made his tender of proofs and up to July 6, 1888.

Objected to as incompetent, immaterial, irrelevant and calling for a condition of facts not shown to exist.

A. He has not been absent to my knowledge from the land any length of time.

Q. Were you in a position or situation to know if he had been absent from the land up to that time?

A. Yes; I moved there in 1885, and from that time he had been there continuously.

39 Q. The complainant in this case, has he made that his home up to the present time?

Objected to as incompetent, immaterial, irrelevant.

A. Yes, sir.

Q. What, in your opinion, was the value of the improvements on said land up to July 6, 1888, including the breaking?

Objected to as immaterial and irrelevant.

A. I should judge it would be about seven or eight hundred dollars anyway.

Q. What in your opinion is the present value of the improvements?

Objected to as immaterial and irrelevant.

A. It would range about $1,700 or $1,800.

Q. State what the improvements now consist of on the land?

Objected to as incompetent, immaterial, irrelevant.

A. He has a house about 12 by 34, barn about 24 by 30; a windmill and well; fencing, large orchard; forest trees; I should judge about 120 or 125 acres broken under cultivation.

Q. State who set these trees out, if you know.

Objected to as incompetent, irrelevant, immaterial.

A. He set them out himself.

Q. State what the condition of this land was when your brother Jas. M. Deweese entered on this land.

A. It was raw prairie land.

Q. Was it fenced?

A. No, sir.

Q. Were there any improvements on it?

A. No, sir.

Cross-examination.

By Mr. MAGOON:

Q. Where were you living in 1883?

A. I was living in Fillmore county.

Q. How long had you resided there?

A. I moved there in that year.

Q. What time in the year?

A. It might have been the year before; it was in July I went there I think though, it was that year I moved out there.

Q. You moved to Fillmore county in the month of July, 1883?
A. It was either 1882 or 1883.
Q. How long did you reside in Fillmore county?
A. About two years.
Q. From that county to what place did you then move?
A. I moved to Saline county.
Q. Do you know of your own knowledge the length of time that your brother was absent from the land involved in this controversy during the year 1883 and 1884 and up to the time of your advent in Saline county in the year 1885?
A. No, sir; I do not know.
Q. Did you ever see this land prior to the time of your removal from that county into Fillmore county?
A. Yes, sir.
Q. When did you see it first?
A. In August, 1883.
Q. That was the first time you saw it?
A. Yes, sir.
Q. When did you next see it after the month of August, 1883?
A. I think it was in December, 1884; I am not positive, but I think that was the time.
Q. What was its condition as regards improvements in the month of December, 1884?
A. There was some breaking on it and a house.
Q. When did you next see it?
A. In 1885, when I moved there.
Q. Now what was its condition in the month of August, 1883, as regards improvements?
A. There was a house and some breaking; I could not tell you just how much; there was some breaking, though.
Q. Then how do you know it was raw prairie and there were no improvements on it when your brother entered upon the land?
A. Well, it was new breaking and he had of course done the breaking; I supposed he had.
Q. You supposed he had done the breaking?
A. I had no reason to think otherwise.
Q. The first time you ever saw this land there was a house on it and some breaking, was there not?
A. Yes, sir.
Q. And further than that you know nothing regarding the improvements, of your own knowledge?
A. No, sir; I drove across the land and that was all I saw, was this house and a kind of stable there and some breaking.
Q. The first time you ever saw this land there was a house, a stable and some breaking on it?
A. Yes, sir.
Q. And you did not see it from the month of August, 1883, till the month of December, 1884?
A. I think not.
Q. And from that time on you did not see it until what month in the year 1885?

A. It was March I think.
Q. Was that the month you moved back to Saline county?
A. Yes, as near as I can remember.
Q. And where did you move to when you came back to Saline county?
A. I moved on the same section.
Q. You lay some claim to a portion of the land in this section?
A. Yes, sir.
41 Q. You have a claim alleged to exist regarding one of the quarters in this same section, do you not, sec. 14, township 5, range 3, in Saline county, Nebraska?
A. Yes, sir.

U. G. DEWEESE.

ELMER CASTOR, being first duly sworn, testified as follows:

By Mr. LAMBERTSON:

Q. Where do you reside?
A. I reside in Wilbur now.
Q. What is your business?
A. Farming; I have worked at the bridge business.
Q. How long have you lived there?
A. In Wilbur?
Q. Yes, sir.
A. I moved there last July.
Q. Are you acquainted with Jas. M. Deweese, Jr.?
A. Yes, sir.
Q. Do you know where the quarter section of land is on which he resides?
A. Yes, sir.
Q. When did you first see the land?
A. I first saw the land the winter of 1883; about January, I think.
Q. What was its condition at that time?
A. It was raw prairoe.
Q. Were there any improvements on it?
A. No, sir; some frame houses, shall houses.
Q. Do you know who had put those houses on?
A. I was not there at the time they were built, no.
Q. Who was living in them at the time you first saw them?
A. James Deweese.
Q. Was James Deweese married at that time?
A. No, sir; not to my knowledge.
Q. When was it you say you first went there?
A. I came to Wilbur the winter of 1883, December, 1883.
Q. Now when was it you saw this land after that?
A. I went out there I think it was in January, shortly after I came there.
Q. January, 1883 or 1884?
A. I think 1884; I came in December and I went out there three or four weeks after I came.
Q. You saw this land then in January, 1884, first?

A. Yes, sir.

Q. Who was living in this house on the northeast quarter of section 14, township five, range three?

A. Jim Deweese.

Q. Do you know how long he continued to live there?

A. He has been living there ever since to my knowledge.

42 Q. Continuously?

A. I think so.

Q. How often have you seen the land from time to time?

A. Ever since, from that time up to 1885, I was out there often; I do not know just how often, but since that I have lived on the land for three years steady.

Q. I mean on that quarter section, have you lived on that quarter section?

A. No; not on that, adjoining that.

Q. State what the improvements were on that land, say on or about July 6th, 1888.

Objected to as incompetent, immaterial, irrelevant.

A. Well, he had a frame house and a small frame barn, and a well and some trees set out and a pasture.

Q. Was the pasture fenced?

A. Yes; he had several acres broken; I do not know just how many acres were broken.

Q. In July, 1888, was there as much as 70 acres broken?

A. I should judge there was something like that.

Q. How much is broken on that land at present?

Objected to as incompetent, immaterial, irrelevant.

A. I should think there is 120 acres anyways.

Q. 120 acres?

A. I should think there was.

Q. Any other improvements on the land that did not exist in July, 1888, since July, 1888?

A. Yes, sir.

Q. What are they?

Objected to as incompetent, immaterial, irrelevant.

A. He has put up a windmill, pump, tanks, barns, corn-crib, and he has broken more.

Q. What would be the fair and reasonable value of the improvements on there at the present time?

Objected to as incompetent, immaterial, irrelevant.

A. I should think they ought to be worth $1,700.00 or $1,800.00.

Q. What would be the fair and reasonable value of the improvements on the 6th day of July, 1888?

Objected to as incompetent, immaterial, irrelevant.

A. Well, I should think about $600 or $700.

Q. What stock has he on the place at the present time?

Objected to as incompetent, immaterial, irrelevant.

A. He has five or six head of horses and hogs, cattle, chickens.

43 Cross-examination.

By Mr. MAGOON:

Q. When did you move out onto that land adjoining this quarter section?

A. In 1885.

Q. What month?

A. I went out there in November.

Q. Prior to that time you say you had been at this place, off and on, how often were you out there during the preceding year?

A. I do not know; I was out there—I suppose I averaged once a month, went out sometimes chicken hunting, I suppose I averaged once a month.

Q. Were you on this land every time you went out there?

A. Went right across it.

Q. Was Mr. Deweese there every time you were there?

A. I couldn't say as to that.

Q. Did you see him every time you were there?

A. I do not know as I did.

Q. Did you see him any time that year preceding your removal?

A. Yes, sir.

Q. How often did you see him?

A. I do not know as I could tell; I remember seeing him; I do not know how often I did see him.

Q. You recall the fact of having seen him in the year 1884 on that place?

A. Yes, sir.

Q. You cannot tell how many times?

A. No, sir.

Q. You saw him when you were out chicken hunting?

A. Yes, sir.

Q. You never saw this land prior to the month of January, 1884?

A. No.

Q. And at that time there was a house and some breaking on it?

A. Yes, sir.

Q. Where do you reside now?

A. I live in Wilbur now.

Q. Where did you reside when you moved on that land adjoining this?

A. Section fourteen.

Q. You lived on some of this land, section fourteen?

A. Section fourteen.

Q. What quarter?

A. Southeast quarter.

Q. Do you lay any claim to that southeast quarter?

A. No, sir.

Q. You have a suit pending in court now on that quewtion?

A. Yes, sir.

Q. The question of your claim to that quarter of this same section is now being litigated?
A. Yes, sir.
Q. Mr. Castor, what relation are you to Mr. Bernard L. Castor?
A. Second cousin.

ELMER E. CASTOR.

44 BERNARD L. CASTOR, being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. LAMBERTSON:

Q. State your name.
A. Bernard L. Castor.
Q. Where do you reside?
A. At Wilbur, Nebraska.
Q. What is your business?
Q. Real estate and farming, both.
Q. Do you know Jas. M. Deweese, Jr.?
A. Yes, sir.
Q. Do you know where he resides?
A. Yes, sir.
Q. How long has he resided there?

Objected to as immaterial and irrelevant.

A. Since June, 1883.
Q. Do you know what kind of improvements he made on the property at the time he went on there?

Objected to as immaterial and irrelevant.

A. Yes, sir.
Q. State them as near as you can.

Objected to as immaterial and irrelevant.

A. He built a small frame shingle-roof house about fourteen feet square, did some breaking and set out some trees and had a well put on there, and a small stable at that time when he first went on.
Q. State as near as you can and as fully as you can whether the five years immediately following that he remained on the land and what improvements he made, as near as you can.

Objected to as immaterial and irrelevant.

A. The first five years he did some breaking, I don't know exactly how much; built a house and stable, bored a well, and fenced a pasture off.
Q. Do you know about how many acres of land he broke up to that time?

Objected to as immaterial and irrelevant.

A. I should judge about 75 acres.
Q. Do you know how many acres he has broken now?

Objected to as immaterial and irrelevant.

A. He has about 125.

Q. State whether or not he has cultivated it during all these years.

45 Objected to as leading, immaterial and irrelevant.

A. Yes, sir.

Q. Did he reside on it continuously with his family?

Objected to as leading, immaterial and irrelevant.

A. Yes, sir.

Q. How much of a family had he?

Objected to as leading, immaterial and irrelevant.

A. No family when he first came; he was married about the fall of 1885.

Q. How many children has he?

Objected to as immaterial, irrelevant.

A. He has now three or four, I do not know.

Q. What, in your judgment, is the value of the improvements of all kinds and character at the end of the five years after his settlement upon the place and making his application for homestead?

Objected to as immaterial and incompetent, the witness not having shown himself qualified to answer.

A. From six to seven hundred dollars.

Q. Were you present when the original application was made at the land office at Beatrice?

A. Yes, sir.

Q. State what was done at that time.

Objected to as incompetent and irrelevant and not the best evidence.

A. He made a homestead application on the northeast quarter of section fourteen, town. five, range three east, Saline county, Nebraska.

Q. An affidavit?

A. Yes, sir.

Q. What was done with that?

Objected to as incompetent and not the best evidence.

A. It was rejected.

Q. Any fees tendered?

A. He tendered fees, but they were refused.

Q. Fees as required by law?

Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. How much did he tender?

Objected to as irrelevant, immaterial and incompetent.

46 A. He tendered $20.00 and told them to take out the fees, whatever it was.

Q. And they declined?
A. Yes, sir.
Q. What, in your opinion, is the present value of the improvements on the land?

Objected to as immaterial and irrelevant.

A. Not less than $1,600.00.

Cross-examination.

By Mr. MAGOON:

Defendants offer certified copy of list exhibiting the tracts of public land situate in the Brownsville district, now Beatrice district, which were selected for the State of Nebraska, under the provisions of the 8th section of the act of Congress approved Sept. 4, 1841, entitled, "An act to appropriate the proceeds of the sales of public lands and to grant pre-emption of rights," marked Exhibit "D 1/2."

Q. Which quarter section is it you lay claim to?
A. The southwest quarter of sec. 14, town. 5, range 3 east, in Saline county, Nebraska.

BERNARD L. CASTOR.

Defendant offers testimony as follows:
Defendant offers the whole of the deed from the State of Nebraska to the Misland Pacific Railway Co., the description being as follows: "In township five north of range three east of the sixth principal meridian, all of section fourteen, containing six hundred and forty (640) acres, together with the signature and proof of execution of said deed and the signatures of Wm. H. James, acting governor and Wm. H. James, secretary of state; that descriptions of the other land defendant omits as being immaterial. Said deed is marked Exhibit "E" and made a part hereof.

To which offer the plaintiff objects as incompetent, no foundation having been laid for proving the genuineness of the signatures and the execution of the deed.

Defendant next offers the deed from the Midland Pacific Railway Co., a corporation under the laws of the State of Nebraska, by Benj. E. Smith, president of said railway Co. to Joel N. Converse; the description of the lands other than section fourteen, town. five, range three east, Saline county, Nebraska, is omitted as immaterial; together with the record of the filing and recording of said deed. Said deed is marked Exhibit "F."

47 To which offer the plaintiff objects as incompetent, no proper foundation having been laid verifying the genuineness of the signatures thereto and of the filing thereof.

Defendants next offer in evidence deed from Joel N. Converse and wife to David S. Gray, trustee, together with the record of filing in Saline county. Said deed is marked Exhibit "G."

To which the plaintiff objects as incompetent, no proper foundation having been laid proving the genuineness of the signatures thereto and filing thereof.

Defendants next offer in evidence deed from David S. Gray, trustee for J. N. Converse & Co., and Eugenia D. Gray, his wife, to Jacob Reinhard and Frederick Fieser, together with the filing for record; said deed is marked Exhibit "H."

To which offer the plaintiff objects as incompetent, no proper foundation having been laid showing the genuineness of the signature and the recording thereof.

The parties hereto agree to adjourn the taking of further testimony until the 29th day of November, 1892, at which time the taking of testimony will be continued at the office of the register of the United States land office, at Lincoln, Nebraska, at ten o'clock a. m.

LINCOLN, NEBRASKA, *Nov.* 29, 1892—10 a. m.

Pursuant to adjournment, the taking of testimony is now resumed, as follows:

C. J. ERNST, being first duly sworn, testified as follows:

By Mr. DEWEESE:

Q. You may state your name, age, place of residence and occupation.

A. C. J. Ernst; age, 38; residence, Lincoln, Nebraska; occupation, assistant land commissioner of Burlington & Missouri River Railroad Company.

Q. As such assistant land commissioner, do you have charge, control and custody of the patents and records of the Burlington & Missouri River Railroad Company in Nebraska, showing the lands patented to that company under the United States land grant?

A. I do.

Q. You may state whether that company received patents from the United States Government under the land grant made to that company for sections thirteen and fifteen, town. five, range three east, in Saline county.

Objected to as incompetent, immaterial, not the best evidence, and calling for the conclusion of the witness.

48 A. They did receive patents for the sections named.

Q. Where are these sections located with reference to section 14, 5, 3 east?

A. Section 13 lies east a*b*d section 15 lies west immediately adjoining section 14.

Q. Were these two sections that you speak of, 13 and 15, embraced in and included in the land grant made to the B. & M.?

Objected to as incompetent, immaterial, irrelevant and not the best evidence, and calling for the conclusion of *t*the witness, and leading.

A. They were.

Q. You may produce the patents issued to the Burlington & Missouri Railroad Company for these two sections.

A. There is a patent covering a large amount of land. This is

patent No. 1, and here are descriptions in the Beatrice district north of the base line, town. five, and east of the 6th principal meridian, showing these are all east of the 6th principal meridian and there is all of section 13.

Respondents object to the answer, as the question just asked him to produce it.

Q. You may show on what page of this patent the sections 13 and 15, town. 5, range 3 east are described.

Objected to as incompetent, immaterial and irrelevant, the patent not being yet offered in evidence and it will show for itself.

A. Sections 13, town. 5, range 3 east is found on page 49 of patent No. 1, and section 15, town. 5, range 3 east is found on page 53 of patent No. 1.

Respondents move to exclude as incompetent, immaterial, irrelevant, not responsive, and stating or pretending to state the contents of a written patent not yet offered in evidence.

Plaintiffs offer- in evidence patent No. 1, issued by the President of the United States, the granting clause of said patent as shown on pages 1 and 2, and the description of the land embracing sec. 13, town. 5, range 3 east, as shown on page 49 of said patent, and of section 15, town. 5, range 3 east, as shown on page 53 of said patent, and the granting clause of said patent as shown on page 55 of said patent, with the signature of U. S. Grant, as President, by J. Parrish, secretary, and the recorder of the General Land Office, C. B. Boynton, and the seal of the General Land Office of the United States, and will attach a certified copy of the same to this deposition for reference, the original marked and identified as Exhibit "I."

49 Respondents desire to cross-examine the witness producing the patent before making an objection thereto.

Cross-examination.

By Mr. MAGOON:

Q. Mr. Ernst, this patent is signed, is it not, on page 55, at its close, in words, as follows: "By the President, U. S. Grant, by J. Parrish, secretary"?

A. Yes, sir.

The respondent- objects to the introduction of the patent in evidence for the reason that it is incompetent, immaterial and irrelevant, that no foundation is laid for its introduction, and that said patent is not executed in accordance with the laws of the United States.

Re-examination.

By Mr. DEWEESE:

Q. You may state whether the Burlington & Missouri River Railroad in Nebraska got those two sections of land referred to under

the grant of the United States Government to said railroad company in the patent above referred to.

Objected to as incompetent, immaterial, irrelevant, not the best evidence, as calling for conclusion of the witness, and seeking to introduce the contents of a written document not yet in evidence, and leading.

A. They did.

Q. What did said railroad company do with said land?

Objected to as incompetent, immaterial, irrelevant.

A. They sold the land to other parties.

The respondents move to strike out the answer of the witness, the same being not responsive to the question, and incompetent, immaterial, irrelevant and not the best evidence.

Q. Where were these sections 13 and 15 located with reference to the lands that were selected under the land grant to the Burlington & Missouri River Railroad Company and patented to it?

Objected to as incompetent, immaterial, irrelevant, not the best evidence and calling for conclusion of the witness.

A. They were lying cornering with other sections selected by the railroad company, and conveyed to it by the same patent.

50 Respondents move to strike out the answer of the witness as being not responsive, incompetent, immaterial, irrelevant and not the best evidence.

Q. Were these sections lying north or south of the line of said railroad company as located in the county of Saline?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.

A. If you mean sections 13 and 15, town. 5, range 3 east, they were lying south of the line of railroad as located and constructed.

Recross-examination.

By Mr. MAGOON:

Q. Mr. Ernst, you have testified as to the location of certain lands alleged to have been granted to the Burlington & Missouri River Railroad Company in Nebraska, and situated, among others, in township 5, range 3 east, of the 6th principal meridian, and with reference to their location, and being adjacent to certain other lands in the same range and township; are you familiar with the location of section 14, town. 5, range 3 east, with reference to the Burlington & Missouri River Railroad in Nebraska, and as originally located and as subsequently built?

A. I could not swear without refreshing my memory from the maps as to the exact distance from the original location of the line, but without actual measurement or reference to the map, I am very positive that section 14——

Q. Just don't answer any other question than the one I asked you.

A. Witness continues *a* answer—town. 5, range 3, lies within twenty miles of the original survey and within less than twenty miles of the road as constructed.

Respondent- moves to exclude the answer as not responsive, and asks the commissioner to read the question.

Q. Question is read to witness.

By Mr. MAGOON: I now ask you if you know?

A. I know where section 14, town. 5, range 3 is located.

Q. With reference to the road?

A. I do as I look upon the map.

Q. Do you know where the B. & M. Road in Nebraska was originally located?

A. Only by an examination of the records, not by personal recollection.

51 Q. Was the road built where it was originally located?

A. It was not.

Q. Do you know at what station on that road it deviated from the line on which it was located originally?

A. It deviated between Lincoln and Hastings, but just where the deviation came in, I do not know without references to the records and maps.

Q. Now, calling the witness' attention to Exhibit "B," I ask you to look at that map and state, if you can, from examination of said exhibit, at what point the road has deviated from the line on which it was originally located?

Complainants object- to the question for the reason that the same is not proper cross-examination, and for the further reason that the evidence is incompetent, immaterial and irrelevant, the witness having testified that he has no personal knowledge except from the records and maps and the map itself and the records are the best evidence.

A. According to this map, Denton would be the station, but I know nothing whatever about this map or who made it, or its correctness.

Q. Now what line on that map indicates the line of the Burlington & Missouri River railroad as originally located?

A. I presume the red line is intended for that, but I know nothing of its correctness.

Q. All the red lines on the map?

A. I would presume that all the red lines on the map were intended for that.

Q. Directing your attention to the red line indicated as the "20-mile limit, second location," does that refer to the road?

A. I do not know.

Q. You are not familiar with the twenty-mile limit?

A. I know nothing about this map that you are trying to prove the correctness of by me, and I do not intend to say that I do.

Q. I see you do not intend to answer any question you can avoid.
A. Oh, no sir; that is not it at all.
Q. Do you know anything about the twenty-mile land grant limit of the Burlington & Missouri River railroad?
A. There is no twenty-mile limit.
Q. There is none whatever?
A. No, sir.
Q. What does the line on this map indicate- by red flags refer to?

Objected to as incompetent, immaterial and irrelevant, and not proper cross-examination.

52 A. If you would ask me to certify to a map coming from our department that I knew something about, I would answer, but I will not answer concerning a map of which I know nothing.

By Mr. MAGOON: Please read the question.
Question read as follows: "What does the line on this map indicated by red flags refer to?"

A. I know nothing about the lines on this map except what they are marked, what the draughtsman has marked them.
Q. You cannot tell what the line indicates that the red flags refer to?
A. I might presume what it referred to, but cannot positively say.
Q. You would be willing to swear to a map prepared by a draughtsman from your office?
A. I would be willing to swear to a map made from records which I know are correct.
Q. If somebody else made it you would swear to it?
A. If I knew it was correct.
Q. You know nothing about the location of the Burlington & Missouri River Railroad in Nebraska?
A. I do.
Q. You cannot tell when looking at the map if it is accurate?
A. That depends on where the map comes from; if it comes from the chief engineer's office and has been examined by an officer of the company I take it for granted it is correct; if it comes from anywhere else, I don't know.
Q. You are willing to swear to a map that comes from the engineer of your own road?
A. I would not swear to it if — know it was not correct.
Q. In a case of emergency you would swear to it?
A. I would as far as I know about it.
Q. Would you have any further knowledge of a map prepared by your road than a map prepared by the office in Washington?
A. Yes, I would; because the records are all there and not fifteen hundred miles away, and I could prove it if I saw fit.
Q. You could look at some of the records in your office?
A. Yes, if it was there.

Q. That would be the only basis you would have of proving the map?

A. No, sir; in a great many cases I would know it from personal examination of the ground.

Q. With reference to range three (3) in Nebraska, east, do — know anything about the location of the road in that range?

A. Yes, as constructed.

Q. Through what sections does it pass?

53 A. I cannot give you the exact location, which corner of which section.

Q. I ask you which section it runs through?

A. I cannot tell you from memory exactly; I know it runs through the southern part of township eight (8) in range three.

Q. It does?

A. Yes, sir.

Q. And you cannot tell from that map?

A. I can tell from that map if the map is correct.

Q. Look at that map and tell whether it is correct.

A. I do not know whether it is correct or not.

Q. In your judgment is it correct?

A. I think it is substantially correct.

Q. You think it is substantially correct?

A. Yes, sir. You mean the line as constructed?

Q. I mean by the map.

A. You were only asking about town. 8, range 3; I am not swearing as to the whole map.

Q. What do you think about the whole map?

A. I have no answer to give—I presume it is correct, but I do not know.

Q. In your judgment it is correct?

A. I did not so state. When I answer, "I believe it is correct," I was answering questions about range 3 east, and my answer was intended to show as far as range 3 east is concerned on this map; I think it is substantially correct.

Q. What do you say as to the balance of the map?

A. I do not say anything.

Q. You do not know?

A. No, sir.

Q. How do you know section- 13 and 15 lie immediately adjacent on either side to section 14, in range 3, in township 5?

A. Because they always lie adjacent, there is no other subdivision of townships in existence in this State.

Q. Did you ever hear of a meandering line?

A. There are meandering lines along rivers.

Q. And there are rivers in the State of Nebraska?

A. Yes, sir.

Q. The Platte river is here?

A. Yes, I think so.

Q. And the Republican?

A. Yes, sir.

Q. Will you state that the meandering lines do not change the number of sections in this State?

A. I will swear the meandering lines do not change the relative positions of sections or numbers.

Q. And you are willing to testify that the meander lines would not change the relative locations of any of the sections in this State?

Objected to by plaintiffs in regard to this question and the manner of cross-examination, for the reason that it is not proper cross-examination and not competent nor material.

54 A. I would say that section 14 is always located between sections 13 and 15, no matter what meandering lines may exist.

Q. Throughout the entire State of Nebraska?

A. So far as I have ever found anywhere in this State.

Q. You are as positive of that as you are of anything you have testified to?

A. I am; if there is an exception to that it has never come to my notice.

Q. And you have based your evidence relative to the corresponding positions of sections 13, 14 and 15 on your belief and experience that section 14 always lies between 13 and 15, in this instance, and that is all?

A. That is all; it might lie sometimes on the comet that has been near this earth, I presume.

Q. I presume you are as competent to testify to a comet as anything else?

A. Yes, I like to testify to a lot of trash; I will come up the next time for such stuff.

Q. Do you still desire to be understood as testifying that there is no twenty-miles limit to the Burlington & Missouri River Railroad land grant?

A. I wish to be understood as testifying that there is no lateral limit to the Burlington & Missouri River Railroad land grant as decided by the United States Supreme Court.

Q. The Supreme Court will probably get along without any of your bolstering assistance; if you answer my question we will get along.

A. I am answering the question; I cannot answer it in any other language.

Q. Do you know when the line of location of the Burlington & Missouri River railroad was changed?

A. I do not know the date of change of location.

Q. Do you know the date of its location?

A. Of its final location?

Q. Its original location.

A. I know the date when its location was permanently fixed and the map filed.

Q. When was that?

A. It was completed June 15, 1865, and the map filed in Washington June 22, 1865.

Q. That was as the line was built or located?

A. As then located, and I presume that was the line that was built, but I could not swear to that.

Q. That the line as located June, 1865, was the line that was built?

A. Yes, that is my understanding.

Q. There had been a prior location?

A. Yes, sir.

Q. Do you know when that was?

55 A. Some time previous to that date; I do not know exactly when, probably in 1864.

Q. The latter part of that year, was it not?

A. Yes, I think it was.

Q. At about Nov. 9, 1864?

A. I will fix no exact date; I am not in a position to.

Q. But its final location was June 15, 1865?

A. Yes, it was.

Re-examination.

By Mr. DEWEESE:

Q. Do you remember that the change in line between Lincoln and Kearney, in Nebraska, was made by virtue of an act of Congress, passed in 1871, and the line thrown for a portion of the distance further south?

Objected to as calling for the witness' interpretation of an act of Congress, incompetent, immaterial and irrelevant.

A. I remember that there was an act of Congress authorizing a change in the line, and if that was in 1871, then I am probably mistaken about the present constructed line being the location of June 15, 1865; I have no recollection without refreshing my memory as to the date of the act of Congress.

Defendant objects to the answer as not the best evidence, acts of Congress being dependant upon other means of identification than the recollection of individuals.

Before signing I wish to add that, in asking me to testify to the maps "Exhibit B" (see pages 61–65), I was asked to testify to the bare map, some other document attached to same not being shown *shown* to me but turned so I could not see it. This may have been, and may not, a certificate of its authenticity, but I was given no change to see the same. As to the "original" and other surveys of the B. & M. R. R. (pages 68 & 69) I had no personal knowledge of connection with the same, never before had occasion to look into the same in such detail, and had no opportunity to examine records concerning this matter prior to the time that this testimony was asked of me.

C. J. ERNST.

56 L. O. WESTCOTT, being duly sworn, testified as follows:

Examined in chief.

By Mr. DEWEESE:

Q. State your name, age and residence.

A. L. O. Westcott; am 48 years old; I reside in Saline county, Nebraska, near Swanton.

Q. What is your business?

A. Farmer.

Q. Where do you live with reference to sec. 14, town. 5, range 3 east?

A. I live in the same town. and the same range, on section 24, and I have a part also of section 13, town. 5, range 3 east.

Q. Do you own a part of it?

A. I own 200 acres there, part of section 13. I own the south half of the southwest quarter of thirteen.

Q. From whom did you buy it?

Objected to as immaterial.

A. I bought a contract from a man by the name of Mason.

Q. Who issued this contract?

Objected to as immaterial, irrelevant and incompetent, and not the best evidence.

A. The contract was made by the B. & M. R. R. Co.

Q. For the sale of the land?

Objected to as incompetent, immaterial and irrelevant and calling for the contents of a written document, and not the best evidence.

A. Yes, sir.

Q. Do you know, and are you acquainted with the northeast quarter of section 14, town. 5, range 3 east, where James M. Deweese, Jr., lives?

A. Yes, sir.

Q. How long have you known him and his residence there?

A. I think something like nine years; I am not positive; I knew Mr. Deweese when he first came there; got acquainted with him when he first moved there; maybe nine years or a trifle over.

Q. State whether or not his residence has been continuous there.

A. It has since he moved there.

Q. Is he living there yet?

A. Yes, sir.

Q. Do you know the improvements on that quarter he lives on?

A. Yes, reasonably well.

Q. What do they consist of?

Objected to as incompetent, immaterial and irrelevant.

57 A. I think the whole quarter, as near as I know, except a small pasture at one corner, is improved and broken up, and he *is* a pretty fair barn and house upon it, and well, and as I said before, a pasture.

Q. Orchard and trees?

Objected to as incompetent, immaterial, irrelevant and leading.

A. Yes, sir, trees.

Q. Do you know about what the improvements he has put on that land are fairly worth?

Objected to as immaterial, incompetent, irrelevant.

A. I, of course, would have to guess in regard to that, the valuation of improvements, I suppose as far my knowledge goes I know what they are worth, if I am competent to judge.

Q. Do you know whether he has a well and windmill on the place?

A. Yes, sir.

Q. You may state what the improvements he has put on that land are fairly worth.

Objected to as incompetent, immaterial, irrelevant and no foundation laid.

A. As I said before, nearly all the place is broken up, probably 120 acres as well as I could figure it.

Q. What are all the improvements worth, orchards, trees and everything?

Objected to as incompetent, immaterial, irrelevant and no foundation laid.

A. I suppose somewhere in the neighborhood of $1,600.

Q. Are you acquainted with the southwest quarter of section 14, town. 5, range 3 east?

A. Yes, sir.

Q. Do you know the improvements that have been put on that land?

A. Yes, sir.

Q. Do you know B. L. Castor?

A. Yes, sir.

Q. Do you know about when he went on there?

Objected to as incompetent, immaterial, irrelevant.

A. I do.

Q. About when was it if you remember?

Objected to as immaterial, incompetent, and irrelevant.

A. I think he went on there at first in 1884; I am not possitive exactly as to the time; I could not say as to that.

58 Q. Do you know what improvements he has put on that place?

Objected to as incompetent, immaterial, irrelevant.

A. I think something like 100 or 115 acres are broken; a very good house and barn; I do not know just how large the house is and what rooms are in it, but it is in good condition.

Q. Any trees?

A. I do not recollect that there are many trees about it.
Q. Any fencing?
A. Yes.; a pasture fence on it, and some wire that has been in fence, and some other fence besides the pasture, but I do not know how much.
Q. Any wells and outbuildings?
A. There is a shed or something there, but I do not know just how much there is.

Defendants object to all these questions in regard to the improvements as incompetent, immaterial and irrelevant.

Q. You may state about what the improvements he has put on that quarter are fairly worth.

Objected to as incompetent, immaterial and irrelevant.

A. I think they would be worth very near the same as the other quarter, maybe a little more, the building of the house may be a trifle better than the other; I do not know just exactly what they would be worth; I should judge $1,600.00 or $1,800.00.

Cross-examination.

By Mr. MAGOON:

Q. Were you in that community prior to the time that James M. Deweese, Jr., located where he now resides?
A. Yes, sir.
Q. What year did he move on there?
A. I am not positive as to that, but I think it was somewhere in 1883.
Q. Do you remember what months in 1883, what part of the year?
A. It was in the spring, some time in the fore part of the summer or spring; I could not say positively as to the month, but I think in June, perhaps.
Q. Now, referring to the southwest quarter, the one on which Mr. Bernard L. Castor lives, *where* you there prior to the time Mr. Castor moved there?
A. Yes, sir.
Q. What was the character of the land as regards improvements on that quarter at that time?
59 A. I think there were no improvements on it.
Q. Raw prairie?
A. It was raw prairoe I think; I used to cut over it with my machine.
Q. You are familiar with that quarter?
A. Yes, sir.
Q. No improvements on it?
A. No, sir.

L. O. WESTCOTT.

CHAS. H. DUNNING, being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. DEWEESE:

Q. State your name, age, place of residence and occupation.
A. Chas. H. Dunning; I was 33 years old in April; live in Saline county, Nebraska, near Swanton.
Q. Occupation?
A. Farming.
Q. How long have you lived there?
A. In Saline county about 24 years.
Q. How close to sec. 14, town. 5, range 3 east do you live?
A. My land joins it on the east, joins the northeast quarter.
Q. You are in section 15?
A. In section 13.
Q. From whom did you buy that land?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.

A. From the railroad company.
Q. What railroad company?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.

A. The Burlington & Missouri River Railroad Company.
Q. Are you acquainted with James M. Deweese, Jr.?
A. Yes, sir.
Q. How long have you known him?
A. Ever since he has been there.
Q. How long has he lived on the northeast quarter of section 14, 5, 3?
A. I came there the same spring that he did, on the place I am living on now; it was in 1883, I moved there early in the spring.
Q. State whether or not he has lived there and made that his home ever since?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.

A. Yes, he has.
60 Q. Do you know what improvements he has put on the land?
A. He has put on all that is on there.
Q. Do you know what they are?
A. Yes, sir.
Q. You may state if you know what the improvements he has put on there are fairly worth.

Objected to as incompetent, immaterial, irrelevant and no foundation laid.

A. Pretty near; I suppose I could get somewhere near.
Q. You may state what they are worth.

Objected to as incompetent, immaterial, irrelevant, no foundation having been paid.

A. I suppose I would put them between $1,500 and $2,000, somewhere there.
Q. You are a farmer?
A. Yes, sir.
Q. You have made the improvements on your own land?
A. Yes, sir.
Q. You know what such improvements are worth?
A. I know pretty near what mine has cost.
Q. You have always been a farmer?
A. Ever since I was big enough.
Q. Are you familiar with the southwest quarter of sec. 14, town. 5, range 3?
A. Yes, sir.
Q. Do you know B. L. Castor?
A. Yes, sir.
—. Do you know when he went on the land there?

Objected to as incompetent, immaterial and irrelevant.

A. He went on about the same time I did.

By Mr. MAGOON:

Q. Just state if you know.
A. Yes, I do.

By Mr. DEWEESE:

Q. When did he go on?

Objected to as incompetent, immaterial and irrelevant.

A. The same year I did. It was 1883.
Q. Do you know the improvements he has put on the land there?
A. He has put on all that are there.
Q. Do you know what they consist of?
A. Yes, sir.
Q. You may state what the improvements are worth that he had put on that land.

Objected to as incompetent, immaterial, irrelevant no foundation laid.

A. I think his improvements would be about the same as the other on the northeast quarter.
61 Q. Fix the amount.
A. I think it would be between $1,500 and $2,000, or $1,800, somewhere along there.
Q. Any improvements on this land before Castor went onto it?
A. No, sir.

Q. Was there anything on the quarter that Deweese settled on?
A. No, sir.
Q. It was just wild prairie land?
A. Yes, sir; I have herded all over it and mowed over it.

CHARLES H. DUNNING.

It is hereby stipulated by the parties to both actions that the red lines marked "Burlington & Missouri River R. R. and further indicated by red flags, as shown on map marked Exhibit "B," indicates the location of the Burlington & Missouri River railroad as located at the various dates specified on said map, and the blue line deviating from said red line at station marked Denton, and continuing through stations marked Highland, Crete and Dorchester, shows the location of said road as constructed and finally established.

WM. H. CLARK, being duly sworn, testified as follows, viz:

Direct examination.

By Mr. LAMBERTSON:

Q. Where do you reside?
A. Lincoln, Nebraska.
Q. What official position, if any, do you hold under the United States?
A. Register of the United States land office at Lincoln, Nebraska.
Q. Where is that land office located?
A. Lincoln, Nebraska.
Q. How long have you held that office?
A. About three years.
Q. What is the present territory or land district, or what are the present limits of the land district of which you are register?
A. From the Platte river south to the Kansas line, we run into Kansas a little; the Otoe Indian reservation is in our district; east to the Missouri river and west we take in Hamilton, Clay and Nuckolls counties, that is the west boundary.
Q. Does it include Saline county?
A. Yes, sir.
Q. Is section 14, 5, 3 east located within the limits of the Lincoln land district as now constituted?
A. Yes, sir.
Q. Has your office been consolidated with any other office?
A. Yes, sir.
Q. What office?
A. Beatrice.
62 Q. Do you know if that office had been consolidated with any other office?
A. No, sir, I do not.
Q. Do you know from the records of your office that it was once located at Brownville.
A. Yes, sir; we have the Brownville records here.
Q. Have you the Brownville records as well as the Beatrice records in your office?

A. Yes, sir.

Q. I will ask you if you have within your custody a section of a map showing the limits of the Burlington & Missouri River Railroad land grant on the south.

A. Yes, that is part of the records of this office.

Q. I hand you this envelope and ask you where you found it.

A. Found it in that case there.

Q. Did you find the map in the envelope you hold in your hand?

A. Yes, sir.

Q. Please read the indorsement on the envelope?

Objected to as incompetent, immaterial, irrelevant and the envelope can show for itself.

A. "Diagrams of railroad lines and 10 and 20-miles limits and diagrams of reserve lines."

Q. Have you made search to find whether there is any other map than that in your possession and custody, official map and diagram of the Burlington & Missouri River road, other than the one you now have? In other words, is that the only one you have been able to find?

A. That is the only one I have been able to find.

Q. Does that correspond with your official plat showing the limits of the land grant of the Burlington & Missouri River railroad?

A. I could not say, as I have not looked that up.

Q. Didn't you look to see whether town. 5, range 3 east was within the limits of the land grant as shown by your plat?

Objected to as incompetent, immaterial and irrelevant.

A. Yes, sir.

Q. State what you mean by that.

A. Yes, it was within the grant.

Respondents move to strike out the answer of the witness as being incompetent, immaterial, irrelevant and not the best evidence.

Plaintiff now offers in evidence the diagram for the purpose of showing the limits of the Burlington & Missouri River railroad land grant as marked by the Government land office, and for the purpose of showing that section 14, 5, 3 east, in Saline county, Nebraska, is within the limits of the Burlington & Missouri
63 River Railroad land grant as appears from the official plat and diagram on file in the land office, at Lincoln, Nebraska, in custody of the register of othe land office at Lincoln, said diagram being marked Exhibit "J."

Objected to as incompetent, immaterial, irrelevant and no foundation laid for its introduction.

Q. I will ask you if you have in your custody what purports to be a duplicate list of the selections of land made by the Burlington & Missouri River Railroad Company under the act of July 2, 1864?

A. Yes, sir.

Q. I hand you this paper and ask you if that is the paper, and if it is in your custody and where you found it?

A. Yes, sir; I found it among the files of this office.

Plaintiff now offers in evidence what purports to be duplicate of list No. 1, of the Burlington & Missouri River railroad selections under the act of July 2, 1864, as made out by the Government land office, which said list is marked Exhibit "K."

Respondents object as incompetent, immaterial and irrelevant, no foundation having been laid for its introduction.

Cross-examination.

By Mr. MAGOON:

Q. Have you any means of determining from the records of your office as to the whereabouts of the original location of the Burlington & Missouri River Railroad in Nebraska?

A. I have never examined that point; I could not say.

Q. Will you please made an examination and say?

A. It would take probably a half day or a day; I would have to hunt over the files for these maps; it would take some time, because there are a large quantity of papers.

Q. Will you make an examination and learn if the records of this office disclose the whereabouts of the original location of the Burlington & Missouri River railroad through range three east?

A. I do not think there is anything to show where the railroad runs, only the boundary lines of the land grant.

Q. If you do not want to, just say that you wan't.

A. Well, I won't, then.

Re-examination.

By Mr. LAMBERTSON:

Q. Do you wish to modify or change the refusal to make the search requested?

A. Yes; I did not understand what he was getting at; I supposed he wanted it right away; I have made diligent search
64 and will search the office as much as required to find anything in it; will search the office as long as Mr. Magoon wants me to for any information he desires.

By Mr. MAGOON:

Q. Did you examine the plat of range three east?

A. The plat book here; yes, sir.

Q. Did you look at section two of town. 8 north, of range 3, to find whether or not the located line of the Burlington & Missouri River Railroad in Nebraska passed through that section?

A. No; I did not.

Q. You have examined this plat book for sections 2, 8, 3?

A. Yes, sir.

Q. And there is no showing as regards the location of the road?

A. No, sir.

WM. H. CLARK,
Register U. S. Land Office.

Plaintiff now offers certificate of commissioner of public lands and buildings, of date Nov. 29, 1892, showing the number of acres of land received by the State of Nebraska under the internal improvement act of 1841; said certificate is marked Exhibit "L" and made a part thereof.

Respondents object to the materiality and competency of the testimony, waiving the irregular form of the evidence.

F. H. CONEY, being duly sworn, testified in behalf of respondents as follows:

Direct examination.

By Mr. MAGOON:

Q. State your name, age, place of residence and occupation.

A. F. H. Coney; age, 35; residence, Lincoln Nebraska; occupation, chief draughtsman of the B. & M. Railroad Company.

Q. What department of the B. & M.?

A. Engineering department.

Q. Handing you Exhibit "M," I ask you what it is?

A. This is a map showing the line of the B. & M. road as located Nov. 12 to 15th, 1864, through section two, town. eight north, range three east.

Q. Are you familiar with the location of the Burlington & Missouri River railroad and with the plats and charts showing its original location and its constructed line?

A. I am with all the plats and maps in the office and the records generally.

Q. By whom was this map prepared?

65 A. I could not tell who made the map, only by the certificate; that is a tracing I made from a record in the office.

Q. What is the size of the record map down there which you showed me?

A. The scale, do you mean?

Q. No; I want to show how big it is.

A. It is probably between four and five feet in width and twenty or thirty feet long.

Q. What does the red line across this section indicate?

A. Indicates the location of the railroad, or the center line of the track if the railroad was built, the line of stakes.

Q. When did you say this location was made?

A. Nov. 12th to 15th, 1864.

Q. State whether or not this was the original location of the Burlington & Missouri River railroad through this section.

A. That is the only location I know of through that section, with the exception of a little preliminary that run north and ended a mile or so west; it was a preliminary line without curves.

Q. Please state what this map is intended to represent—what section that is and range.

A. Section two (2), town. eight, range three (3) east. I think it was on the map.

Q. In what county?

A. It is at present, I think, in Saline county.

Q. State of Nebraska?

A. I do not know as I know about the county exactly; it is in Nebraska; yes, sir.

Respondents offer Exhibit "M" in evidence.

Plaintiffs object- as incompetent, immaterial and not the best evidence.

Q. Now, state, if you can, in what portion of the north half of section two the original location of the Burlington & Missouri River Railroad in Nebraska was.

A. According to the map we have in the office it is in the north half of the north half of the section.

Q. What map did you refer to?

Objected to as not the best evidence.

A. It is a map from which I traced that, the record map of the Burlington and Missouri River Railroad Company, preliminary and surveyed located lines.

Q. Is this map accurate?

A. That is an accurate tracing of the other map, an exact copy.

66 Q. In regard to this section two, town. eight, range three east, you may state the fact as to whether or not the north forties of this section are larger than the prescribed and usual amount in forties.

A. According to that map they are longer north and south than the usual of a forty.

Q. How much longer?

A. That shows it to be about 250 feet longer according to the scale; there is no figures on that.

Q. What occasions this variance in size?

A. It is occasioned by the irregularities of the Government survey; a fraction always comes on the north and west of the township; they are either long or short generally; very seldom come out right.

Q. This section two touches on the north the north line of the township, does it not?

A. Yes, sir; the north line of the township is the north line of the section.

Cross-examination.

By Mr. LAMBERTSON:

Q. This map offered in evidence is simply traced from a map in the records of the Burlington & Missouri River land office?

A. The Burlington & Missouri engineering department.

Q. Did you make the original map yourself?

A. No, sir.

Q. How old is that map?

A. I do not know exactly; I do not know.

Q. Do you know who did make it?
A. The engineer; I know the name on the map.
Q. Do you know of your knowledge that the map is correct?
A. No, sir.
Q. Did you ever make an actual measurement of the land itself, this section two, for the purpose of seeing how far the line of the railway was from the north line of the section?
A. No, sir.
Q. You have made no measurements of the section itself, and all the measurements you have made have been simply from the map?
A. Yes, sir.
Q. You did not run that survey out, did you?
A. No, sir.
Q. And you know nothing about the location of the road personally?
A. I only know what is on the records.
Q. You do not know that it crosses that section at all, except it appears to on the map?
A. That line is all I know about it.

67 Re-examination.

By Mr. MAGOON:

Q. There never was a railroad built acress that section by the B. & M.?
A. No, sir.
Q. This line indicates the survey and location of the road simply, not a road that was constructed?
A. Yes, sir; the original surveys before the line was constructed.
Q. Is this map the map that was used in your office or by the engineering department of the road?
A. Yes, sir; it is the only map we use.

F. H. CONEY.

Defendants offered in evidence depositions of Jacob Reinhard and Frederick Fieser, heretofore taken, filed and published in this case.

Objected to as incompetent, immaterial and irrelevant, and for the reason that they are not properly certified, authenticated and addressed, as required by law.

The further taking of testimony is continued until tomorrow, Nov. 30, 1892, at Omaha, Nebraska.

OMAHA, NEBRASKA, *Nov.* 30, 1892.

The further taking of testimony is resumed, pursuant to adjournment, as follows:

By Mr. MAGOON: Defendants offer statement of taxes with certificate of E. J. Spirk, county treasurer of Saline county, said statement and certificate being marked Exhibit "N" and attached thereto.

Attached to said testimony are exhibits in words and figures following, to wit:

EXHIBIT A.

UNITED STATES LAND OFFICE,
LINCOLN, NEBRASKA, *July 6th*, 1888.

The foregoing proof is rejected on account of the State of Nebraska. Selected March 26th, 1868. List approved March 29, 1870, No. 7, and application to enter the same rejected Jan. 21st, 1884, as shown by the records of this office.

T. B. DAVIS, *Register*.

68 *Certificate as to Posting of Notice.*

LAND OFFICE AT LINCOLN, NEBRASKA, *July 6th*, 1888.

I, T. B. Davis, register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place, in my office for a period of thirty days, I having posted said notice on the 21st day of May, 1888.

T. B. DAVIS, *Register*.

Notice for Publication.

LAND OFFICE AT LINCOLN, NEB., *May 21st*, 1888.

Notice is hereby given that the following-named settler has filed notice of his intention to make final proof in support of his claim and that said proof will be made before the register and receiver at Lincoln, Neb., on July 6th, 1888, viz: Hd., James M. Deweese, Jr., for the northeast ¼ section 14, township 5, north of range 3 east.

He names the following witnesses to prove his continuous residence upon, and cultivation of said land, viz: Joseph L. Hubbell, of Swanton, Saline county, Nebr.; Christopher Young, of Swanton, Saline county, Nebr.; Theadore Turney, of Swanton, Saline county, Nebr.; Charles E. Lewis, of Swanton, Saline county, Nebr.

T. B. DAVIS, *Register*.

Proof of Publication.

John Knight being first duly sworn on his oath says he is editor of the Opposition, a weekly newspaper, published and in general circulation in Saline county, Nebraska, and that the annexed notice was published in said newspaper six consecutive weeks, the date of the first publication being 24th May, 1888, and the date of the last publication being 28th June, 1888.

JOHN KNIGHT.

Subscribed and sworn to before me this 5th day of July, 1888.
[SEAL.] J. W. SHESTAK,
Notary Public.

Printer's fee, 5.85.
Affidavit.

69 No. 1—Homestead.

LAND OFFICE AT LINCOLN, NEBRASKA, *May* 22, 1888.

I, James M. Deweese, Jr., of Saline county, Nebraska, who made homestead application May 31st, 1883, for the northeast quarter, sec. 14, township 5, range 3 east, 6th P. M., do hereby give notice of my intention to make final proof to establish my claim to the land above described, and that I expect to prove my residence and cultivation before the register and receiver U. S. land office of Lincoln, Nebraska, on sixth day of July, 1888, by two of the following witnesses:

Joseph L. Hubbell, of Swanton, Saline Co., Nebraska.
Christopher Young, " " "
Theodore Turney, " " "
Chas. E. Lewis, " " "

JAMES M. DEWEESE, JR.

LAND OFFICE AT LINCOLN, NEBR., *May* 21, 1888.

Notice of the above application will be published in the Opposition, printed at Wilber, Nebr., which I hereby designate as the newspaper published nearer the land described in said application.

T. B. DAVIS, *Register*.

NOTE.—To claimant: Give time and place of proving up and name and title of the officer before whom proof is to be made; also give names and post-office address of four neighbors, two of whom must appear as your witnesses.

Indorsed: H. James M. Deweese, Saline Co., Nebr. July 6, 1888.

Homestead Proof—Final Affidavit Required of Homestead Claimants.

Section 2291 of the Revised Statutes of the United States.

I, James M. Deweese, Jr., having made a homestead entry of the northeast 4, section No. 14, in township No. 5, of range No. 3 east, subject to entry at —, under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto, by virtue of section No. 2291 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a citizen of the United States; that I have made actual settlement upon and have cultivated said land, having resided thereon since the
70 17th day of June, 1883, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegience to the Government of the United States; and further that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

JAMES M. DEWEESE, JR.

I, T. B. Davis, register of the land office at Lincoln, Nebraska, do hereby certify that the above affidavit was subscribed and sworn to before me this 6th day of July, 1888.

T. B. DAVIS.

Indorsed: Final homestead affidavit under section 2291, R. S.

Homestead, Pre-emption, and Commutation Proof—Testimony of Witness.

The testimony of two witnesses, taken separately, in addition to the testimony of claimant, is required in each case.

The testimony of witness must be taken at the same time and place and before the same officer as claimant's final affidavit.

The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, descriptions of land or otherwise.

Question 1. What is your true name (Christian and surname) given in full, your age, residence and present post-office address? (Give description of land on which you reside, quarter section, township and range.)

Ans. Christopher Young, 65 years, Swanton, Saline Co., Nebr.; S. W. ¼, sec. 23, t'p. 5, R. 6 E.

Ques. 2. What is your present occupation, and where and by whom have you been employed since June 19, 1883, the date of claimant's alleged settlement on said tract?

Ans. Farming for myself on the above farm.

Ques. 3. Are you related to claimant or in any way interested in this claim, or are you connected with him in business of any kind?

Ans. No, sir. No, sir.

Ques. 4. How far from the residence of claimant, on said tract, do you reside, and how long have you lived there?

Ans. Half-mile, have lived there 12 years.

71 Ques. 5. Give the name and residence of two or more persons living nearer to the claimant of this tract than yourself. If none are nearer than you, give the names of two or more next nearest, and state the land on which they reside.

Ans. Benj. Castor, on same section; Chas. Dunning, N. W. ¼, 13, 5, 3 east.

Ques. 6. How long have you known James M. Deweese, Jr., the claimant, for whom you appear as a witness; where has he been living since you first knew him up to the present time, and is he the identical person he represents himself to be?

Ans. I have known him ever since he moved on the claim in 1883 up to the present; he is the identical person.

Ques. 7. Are you well acquainted with the land embraced in this claim? Give correct description thereof; also state the extent of your knowledge and how you know what you affirm.

Ans. I am. N. E. ¼, sec. 14, t'p 5, R. 3 east. I live near and am familiar with — country.

Ques. 8. How often have you been on this tract of land since claimant's alleged settlement thereon, at what time or times and when did you last see him on the land?

Ans. I pass the place frequently once a month. I saw him on the claim about a week ago.

Ques. 9. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No, sir.

Ques 10. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans. Prairie farming land; no timber, only what has been planted.

Ques. 11. Are there any indications of coal, mineral, or salines on this land?

Ans. None that I ever have heard of.

Ques. 12. Is it within any stock range or fence or other inclosure? If so, give the names of the parties owning or in any manner controlling such inclosure or range.

Ans. ——.

Ques. 13. If the land is timber land, state whether the timber, or any portion thereof, and what portion, if any, has been cut or removed, and by whom.

Ans. No timber an- never has been.

Ques. 14. What is this land used for, and who (if any one) besides the claimant is in any manner interested in or uses or controls the land or claims the timber thereon?

Ans. Used for farming and control-ed solely by claimant.

Ques. 15. What has been claimant's occupation since you first knew him, and where has he been employed, and by whom?

Ans. Farming for himself on this claim.

72 Ques. 16. Has he has any other living or boarding place than on this land during the existence of his present claim? If so, state where he has been living or stopping.

Ans. No; he has not.

Ques. 17. Does claimant's family reside on said land? When did they move thereon? How long have they lived there, and do they still reside thereon? If not, where do they reside?

Ans. They do. He moved there in 1883 and married and took his wife there in 1885 and they still reside there.

Ques. 18. Has claimant's family been absent from said land since moving thereon? If so, state how often, how long each time and the cause of said absence or absences.

Ans. Not been absent any length of time.

Ques. 19. State in full and in detail all the facts within your knowledge as to claimant's actual residence upon this claim; when and how often you have seen him upon the land; what were the evidences that he actually lived on the tract; how long he has lived there, and whether he lives there now.

Ans. He has been an actual settler since 1883. I see him frequently on the claim doing all kinds of farm work, careing for his

stock and doing things generally done by a resident or occupant of a farm, and he still resides there.

Ques. 20. If claimant has been absent from said land since his alleged settlement, state fully how often, when, how long each time, and for what purpose.

Ans. Only been absent one time some three or four months to earn money to live on, as he says.

Ques. 21. State in detail the character of the improvement-; what they consist of, and when they were made; the value of each distinct improvement, fully describing the same; also whether they were made by the claimant or by some other person.

Ans. Frame dwelling worth $200; board barn and crib worth $75; well and pump worth $60; orchard worth $75; grove worth $40; fencing worth $30; breaking 90 acres worth $180. Total value, $660.

Ques. 22. Give the size, construction, and material of claimant's house on said tract, and also state whether the same is habitable during all seasons of the year.

Ans. Frame one-story 12 x 22 feet, 2 rooms; comfortable and habitable all seasons.

Ques. 23. What is this land worth and was it ever offered for sale?

Ans. Worth $3,500; not for sale.

Ques. 24. When did claimant commence living upon this land?

Ans. In 1883.

73 Ques. 25. How much of said land has been broken, how much plowed since being broken, and how much put into crop each season? State kind of crops raised, their value, and number of seasons crops were raised.

Ans. 90 broke and 70 acres plowed, wheat, corn and oats each seasons; number of acres in crop each season I can't say.

Ques. 26. Is this land in crop this season, or has it been prepared for cropping the coming season?

Ans. They are.

Ques. 27. Do you believe that claimant intends to continue his residence on this land after making final proof, or does he intend to remove therefrom?

Ans. I do.

Ques. 28. Does claimant, with his family, reside on said land at the present time? You will explain how you know he has resided there, as you have have heretofore stated.

Ans. They do.

(Signature of witness) CHRISTOPHER YOUNG.

U. S. LAND OFFICE,
LINCOLN, NEBRASKA, *July 6th*, 1883.

I hereby certify that Christopher Young personally appeared before me; that he is a credible witness, and is personally known to me (or has been satisfactorily identified before me by Tobias Castor), and that each question in the foregoing deposition was

orally propounded to the said —— ——, and the foregoing answers severally given by him thereto before he signed the same, and after being sworn according to law; that I have called his attention to the law, and penalties against false swearing, and that the foregoing deposition was sworn to and subscribed before me this 6th day of July, A. D. 1888.

T. B. DAVIS, *Register.*

Indorsed: Testimony of witness.

Homestead, Pre-emption, and Commutation Proof—Testimony of Witness.

The testimony of two witnesses, taken separately, in addition to the testimony of claimant, is required in each case.

The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit.

74 The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land or otherwise.

Question 1. What is your true name (Christian and surname), given in full, your age, residence, and present post-office address? (Give description of land on which you reside, quarter section, township and range.)

Answer. Joseph L. Hubbell; 52 years; Swanton, Saline Co., Neb.; S. ½ N. E. 4 sec. 13, t'p 5 N., R. 3 east.

Ques. 2. What is your present occupation, and where and by whom have you been employed since Jan. 17, 1883, the date of claimant's alleged settlement on said tract?

Ans. A farmer working for myself.

Ques. 3. Are you related to claimant or in any way interested in this claim, or are you connected with him in business of any kind?

Ans. I am not.

Ques. 4. How far from the residence of claimant, on said tract, do you reside, and how long have you lived there?

Ans. A half mile nearest point four years last spring.

Ques. 5. Give the name and residence of two or more persons living nearer to the claimant of this tract than yourself. If none are nearer than you, give the names of two or more next nearest, and state the land on which they reside.

Ans. Charles Dunning and James B. Riggins, both joining lands to this claim.

Ques. 6. How long have you known James M. Deweese, Jr., the claimant for whom you appear as a witness, where has he been living since you first knew him up to the present time, and is he the identical person he represents himself to be?

Ans. I have known him for five years; living on this tract since 1883; he is the person he represents himself to be.

Ques. 7. Are you well acquainted with the land embraced in this claim? Give correct description thereof; also state the extent of your knowledge and how you know what you affirm.

Ans. I am N. E. 14, 5, 3 east; by living near this land for the last six years and having been at his house a great many times.

Ques. 8. How often have you been on this tract of land since claimant's alleged settlement thereon, at what time or times, and when did you last see him on the land?

Ans. Nearly every week for the last 5 years, and saw him there yesterday and this morning.

Ques. 9. In said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No, no.

75 Ques. 10. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

Ans. Prairie land—ordinary farming land.

Ques. 11. Are there any indications of coal, mineral or salines on this land?

Ans. None.

Ques. 12. Is it within any stock range or fence or other inclosure? If so, give the names of the parties owning or in any manner controlling such inclosure or range?

Ans. No; it is not.

Ques. 13. If the land is timber, state whether the timber, or any portion thereof, and what portion, if any has been cut or removed, and by whom.

Ans. Prairie devoid of timber.

Ques. 14. What is this land used for, and who (if any one) besides the claimant is in any manner interested in or uses or controls the land or claims the timber thereon?

Ans. It is used for agricultural purposes and by the claimant only.

Ques. 15. What has been claimant's occupation since you first knew him, and where has he been employed and by whom?

Ans. Farming for himself on this claim.

Ques. 16. Has he has any other living or boarding place than on this land during the existence of his present claim? If so, state where he has been living or stopping.

Ans. He has not been living at any other place except once he was away some 3 or 4 months.

Ques. 17. Does claimant's family reside on said land? When did they move thereon? How long have they lived there, and do they still reside there? If not where do they reside?

Ans. Yes; he himself — thereon since 1883, married a wife and moved her thereon in 1885.

Ques. 18. Has claimant's family been absent from said land since moving there? If so, state how oft*em*, how long each time and the cause of said absence or absences.

Ans. Not been absent for any length of time.

Ques. 19. State in full and in detail all the facts within your knowledge as to claimant's actual residence upon this claim; when and how oft*em* you have seen him upon the land; what were the

evidences that he actually lived on the tract; how long he has lived there, and whether he lives there now.

Ans. I have seen him on this tract on a- average once in two weeks for the last four years, have seen — engaged in his agricultural duties on the farm from time to time feeding and careing for his stock; he has lived there for the last five years and lives there now. Seen him digging a well and digging potatoes and such other things as usually done by a householder.

76 Ques. 20. If claimant has been absent from his land since his alleged settlement, state fully how often, then, how long each time, and for what purpose.

Ans. He has been absent but on-e, heretofore mentioned.

Ques. 21. State in detail the character of the improvements; what they consist of, and when they were made; the value of each distinct improvement, fully describing the same; also whether they were made by the claimant or by some other person.

Ans. Dwelling, one-story frame, 2 rooms, worth $150. Board stable worth $30. Pasture fences worth $35. Orchard and grove $50.00. Well worth $50.00. Corn-crib worth $30. Hen-house 15.00. 90 acres broke worth $180. All worth $540.

Ques. 22. Give the size, construction, and material of claimant's house on said tract, and also state whether the same is habitable during all seasons of the year.

Ans. Frame 12 x 22; it is habitable the year round and is very comfortable.

Ques. 23. What is this land worth, and was it ever offered for sale?

Ans. It is worth about $3,500. Never was offered for sale that I know of.

Ques. 24. When did claimant commence living upon this land?

A. In July, 1883, as near as I can tell.

Ques. 25. How much of said land has been broken, how much plowed since being broken, and how much put into crop each season? State kind of crops raised, their value and number of seasons crops were raised.

Ans. Ninety acres has been broken and about seventy I know that he has raised fair crops each year of wheat, oats and corn but can't say how much.

Ques. 26. Is said land in crops this season, or has it been prepared for cropping the coming season?

Ans. They are.

Ques. 27. Do you believe that claimant intends to continue his residence on this land after making final proof, or does he intend to remove therefrom?

Ans. I think he intends to reside there as a home in the future.

Ques. 28. Does claimant. with his family, reside on said land at the present time? You will explain how you know he has resided there, as you have heretofore stated?

Ans. He does and also his family; by seeing him there at work frequently and visiting him and his family.

(Signature of witness) JOSEPH L. HUBBELL.

77 U. S. LAND OFFICE,
LINCOLN, NEBRASKA, *July 6th*, 1888.

I hereby certify that Joseph L. Hubbell personally appeared before me; that he is a credible witness, and is personally known to me (or has been satisfactorily identified before me by Tobias Castor), and that each question in the foregoing deposition was orally propounded to the said —— —— and the foregoing answers severally given by him thereto before he signed the same and after being sworn according to law; that I have called his attention to the law and penalties against false swearing; and that the foregoing depositions was sworn to and subscribed before me this 6th day of July, A. D. 1888.

T. B. DAVIS, *Register*.

Homestead, Pre-emption, and Commutation Proof—Testimony of Claimant.

Full and specific answers must be given to each question.
Evasive answers will be fatal to the proof.

JAMES M. DEWEESE, JR., claimant, being first duly sworn, testifies as follows:

Question 1. What is your correct name, your age, and occupation? If employed by any person, state by whom.

Ans. James M. Deweese, Jr. 27 years. Farmer.

Ques. 2. What is your post-office address?

Ans. Swanton, Saline Co., Nebr.

Ques. 3. Are you the identical person who made — (or homestead entry No. —) at the Beatrice land office on the 31st day of May, 1883, and what is the true description of the land now claimed by you?

Ans. I am. N. E. ¼ sec. 14, t'p. 5, N. of R., 3 east.

Ques. 4. Where did you live before settling upon this land, and what was your occupation?

Ans. Dawson, Richardson Co., Nebr. Farming.

Ques. 5. Are you a citizen, of the United States or have you declared your intention to become such?

Ans. I am a citizen by birth.

(In case the party is of foreign birth, a copy of his declaration of intention to become a citizen, a full naturalization certificate officially certified, must be filed with the case. The latter is only required in final homestead entries.)

Ques. 6. Are you interested in any other entry or filing than the one upon which you nor seek to make proof?

Ans. I am not.

78 Ques. 7. Have you ever made a pre-emption filing for any other tract of land, or made any other homestead entry or filing or entry of any kind?

(Answer each question separately, describe the land, and state what disposition you made of your claim.)

Ans. I did not.

Ques. 8. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans. It is not. It is not.

Ques. 9. What is the character of the land; is it timber, mountainous, prarie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans. It is ordinary agricultural land and most valuable for farming.

Ques. 10. Is the land valuable for coal, iron, stone or minerals of any kind; has any coal or other minerals been discovered thereon or is any coal or mineral known to be contained therein? Are there any indications of coal, salines, or minerals of any kind on the land; if so describe what they are?

Ans. No mineral of any kind, nothing of the kind been discovered, either stone or mineral.

Ques. 11. If the land is timber land, state the kind, quality and amount of timber thereon at date of initiating your claim, the amount still standing, how much has been cut and removed, and by whom, and whether the same has been disposed of, and to whom; also whether any other person than yourself has any interest in the timber; and if so, what kind of interest?

Ans. There is no timber on the land and never has been except what I have planted.

Ques. 12. If the land is used for grazing purposes, state how and by whom it is so used and whether it is within any stock range or fence or other inclosure, and who owns or controls the range or inclosure.

Ans. Not used for grazing except a small pasture that I have fenced and use exclusively for myself.

Ques. 13. When did you first make an actual personal settlement on this land? State what you did to make such settlement, and the character and value of the improvements you then placed upon the land?

Ans. On the 17th of June, 1883, I commenced building a house and done some breaking, the value being about thirty dollars.

Ques. 14. Was the land occupied by any other person when you made such settlement; if so, state who lived there, and how you obtained possession?

Ans. It was not occupied by any other person.

79 Ques. 15. When did you actually move on this land and commence living permanently thereon?

Ans. On the 23" day of July, 1883.

Ques. 16. Where has been your actual personal residence and home during the whole time since the date of this filing or entry?

Ans. On this tract of land.

Ques. 17. Has your residence on the land now claimed been

actual or constructive, continuous or at intervals? Explain what you mean by actual continuous residence.

Ans. My residence has been on this land all the time except about four months in the fall of 1883, and winter of 1884, I was working away from home to save money to live on.

Ques. 18. Have you resided or boarded elsewhere than on this land since commencing your residence thereon? If so, state when and where, how often and for how long.

Ans. I have not boarded elsewhere except the four months above stated.

Ques. 19. Where have you voted since establishing residence on this land, and where did you last vote, and how long have you voted there?

Ans. At Swanton, Saline Co., Nebr., in the same precinct where the land is situated, voted there in 1884 and ever since.

Ques. 20. How many times have you been absent from said tract since you commenced actual residence thereon? Give the dates when each absence commenced and terminated, and the cause therefor.

Ans. I was away once as above stated Nov. 1, 1883, and returned Mar. 5, 1884. I got married Oct. 14, 1885, and was absent seven days.

Ques. 21. Have you a family and of whom does your family consist?

Ans. Yes, a wife and two children.

Ques. 22. Has your family resided with you on this claim? If so, state when they moved on the land, how long they have lived there, and whether they actually reside there still.

Ans. My wife has been — me on the land ever since Oct. 18, 1885.

Ques. 23. If your family has been absent any part of the time since moving on the land, state the cause for and the dates when such absence commenced and terminated.

Ans. They have not.

Ques. 24. When and by whom was your house built? Is it habitable at all seasons of the year?

Ans. I built the house in April, 1884. It is. It is in addition to the first house built.

Ques. 25. Did you and your family live in said house during all of each or any winter since the date of your filing or entry? If not, state the duration and cause of each absence.

80 Ans. I have lived in this house ever since built and my wife since our marriage all the time.

Ques. 26. If your family has not lived with you on this claim since the date of your filing or entry, state the causes therefor, where they did reside, and where they are now living.

Ans. They have lived with me on the land all the time.

Ques. 27. Do you own any other residence house than the one now on your claim? If so, state where, and who occupies the same.

Ans. I own no other residence.

Ques. 28. Describe fully the house on this claim, giving value thereof; also describe fully all other improvements thereon of

whatever kind, giving the value of each and total value of all improvements.

Ans. One-story frame 12 x 22 feet *feet*, 2 rooms, worth $150.00; bo-rd stable worth $50; well worth $35; 2 acres of grove and one acre of orchard worth $100; ninety acres broken worth $180; 14 acres fenced worth $50. Total value, $550.00.

Ques. 29. What farm implements-do you own and use on this claim? State kind and number, and how long you have owned the same.

Ans. One stirring plow, one cultiv—, one harrow, one wagon, one corn-sheller, one breaking plow owned about 4 years.

Ques. 30. What domestic animals and live stock do you own and keep on this claim? State kind and number of each kind.

Ans. 3 horses, 8 cows, 25 hogs.

Ques. 31. State what articles of furniture of every kind you keep and use in your residence on this claim, and how long you have had them there.

Ans. 2 beds, 1 dining-table, 1 cook-stove, one cupboard, 6 chairs. I have the most of these things ever since I moved on the claim.

Ques. 32. Have you any personal property or live stock of any kind elsewhere than on this claim? If so, describe the same, and state where the same is kept.

Ans. I have no other except as stated.

Ques. 33. How many seasons have you raised crops on this land, d what kind of crops have you raised each season?

anAns. 4 seasons corn, oat-, wheat and *totaters*.

Ques. 34. How many acres have you put in crops each year; and how much did you raise? State the amount in bushels of each kind.

Ans. 50 on an average; 600 bu. corn, 300 bu. oats, 50 bushels of potatoes, 200 bu. of wheat.

Ques. 35. Have you the land in crop this year, or is it prepared for cropping the coming season? How much of the land is so cropped or prepared?

81 Ans. I have 70 acres in crop this year.

Ques. 36. Do you carry on any trade, profession, or business elsewhere than on this land? If so, state what business you have been engaged in while claiming this land, where it was carried on, and the distance from your claim.

Ans. I do not.

Ques. 37. If you have been employed in working for others away from the claim since you established residences thereon, state when, where, and for whom, in what occupation or capacity, how long you have so worked, and where you staid and lived during that time.

Ans. I have not.

Ques. 38. Where are you assessed for taxes—personal, real estate, or license—and when and where have you paid taxes since claiming this land?

Ans. I am assessed in the precinct where this land is situated and pay taxes at county-seat this year.

Ques. 39. Are the improvements on this land assessed for taxes?

If so, at what valuation? Have such taxes been paid? If so, when and by whom?

Ans. I have been, on improvements for the last four years and paid—don't remember amount.

Ques. 40. What use is made of this land, and who, besides yourself and family, uses it or causes it to be used?

Ans. For agricultural purposes; no one except myself.

Ques. 41. Have you sold, transferred, or mortgaged this land, or offered or agreed to sell or dispose of it, and at what price?

Ans. No, no.

Ques. 42. Do you make this entry in the interest or for the benefit of any one else, or has any person other than yourself and family any interest, immediate or prospective, in this entry? If so, state for whom the entry is made.

Ans. No one except myself and family.

Ques. 43. Has any person paid your expenses for making this entry or paid you wages or a salary on condition that you make said entry, or agreed to do either, or agreed to pay the entry money for you, or to pay the fees or commissions, with the agreement or understanding that you will deed the land after entry is made?

Ans. No, no.

Ques. 44. Do you make this entry in good faith, for the exclusive purpose of a home and farm for yourself and family?

Ans. I do.

(Signature of claimant) JAMES M. DEWEESE, JR.

I hereby certify that each question in the foregoing deposition was orally propounded to the said James M. Deweese, Jr., and the foregoing answers severally given by him thereto before he
82 signed the same, and after being sworn according to law; that the said James M. Deweese is to *ne* personally known (or satisfactorily identified by J. W. Deweese) as the person he represents himself to be in making this proof; that I have called his attention to the laws and penalties against false swearing, and that the foregoing deposition was sworn to and subscribed before me this 6th of July, A. D. 1888.

T. B. DAVIS, *Register.*

Indorsed: Testimony of claimant. Pre. D. S. No. —. Cash No. —. Orig. h'd No. —. F. C. No. —. Name of claimant, James M. Deweese, Jr.

EXHIBIT "B."

Refer in reply to this initial G. J. J. B.

1883—48, 788. H. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 8th*, 1883.

J. W. Deweese, Esq., Lincoln, Nebraska.

SIR: Your letter of the 24th ult. relative to the cancellation by this office under date of Jan'y 30th, 1879, of State of Nebraska internal improvement selections, embracing section 24, T. 6 N., R. 3 E., and referring to a discrepancy between said letter of cancellation and a previous letter from this office as to the grounds for such action, has been received.

In reply I would state that an examination of the records of this office shows that under date of August 29th, 1871, per letter "F," the register and receiver at Beatrice, Neb., were advised that certain selections (a list of which was enclosed) embracing even sections along the line of the B. and M. R. railroad, in the above and adjoining township were illegal, under the provisions of the act of March 6th, 1868, being for double-minimum lands, and that the same were thereby canceled.

The above action it appears was not noted upon the records of State selections, and it having been found upon a subsequent examination, that the selections referred to were in excess of the quantity to which the State was entitled by law, the same were canceled Jan'y 30th, 1879, upon those grounds, and the local officers and State authorities so advised.

It will be seen therefore that the selections were illegal for two reasons: 1st, in being for double-minimum lands; and, 2d, being in excess of the quantity granted by law.

83 The even sections along the line of the B. and M. R. railroad were increased in price to $2.50 per acre March 1st, 1867; hence the selection of section 14, T. 5 N., R. 3 E., under date of March 26th, 1868, was illegal, and the approval and certification of the same March 29th, 1870, was erroneous.

Very respectfully, L. HARRISON,
Acting Commissioner.

EXHIBIT "C."

C. A. K.
DEPARTMENT OF THE INTERIOR, J. J. B. P.
GENERAL LAND OFFICE, L. J. W.
WASHINGTON, D. C., *May* 25, 1889. J. V. W.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed copy of the record in the *ex parte* cases of James M. Deweese, Jasper C. Deweese, Bernard L. Castor, and Mary E. Brolliar, with the interlineations and erasures appearing

thereon, is a true and literal exemplification of the original papers on file in this office.

In testimony whereof, I have hereunto subscribed my [SEAL.] name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. M. STOCKSLAGER,
Commissioner of General Land Office.

Homestead.

Application No. —.

LAND OFFICE AT BEATRICE, NEBRASKA, *May* 31*st*, 1883.

I, James M. Deweese, Jr., of Richardson county, Nebraska, do hereby apply to enter, under section 2289, and the act of Congress approved March 3d, 1879, Revised Statutes of the United States, the northeast quarter of section fourteen, in township five N. of range three east, containing one hundred & sixty acres.

JAMES M. DEWEESE, JR.

[Printed across the face in red ink:] U. S. land office, Beatrice, Nebr., May 31st, 1883. This application is hereby rejected for the reason that the land described was selected by the State of Nebraska, M'ch 26, 1868, which selection was approved March 29, 1870, as per list No. 7. H. W. Parker, register.

84 LAND OFFICE AT ——, ——, 188–.

I, —— ——, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the appellant is legally entitled to enter under section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

—— ——, *Register.*

Indorsed: No.—. Homestead application—. ——, 188–. Sec.—, town. —, range —.

Homestead.

(Affidavit.)

LAND OFFICE AT BEATRICE, NEBRASKA, *May* 31*st*, 1882.

I, James M. Deweese, Jr., of Dawson, Richardson county, Neb., having filed my application No. —, for an entry under section No. 2289 and the act of Congress approved March 3d, 1879, Revised Statutes of the United States, do solemnly swear that I am a citizen of the United States over twenty-one years of age, that said application, No. —, is made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever; and that I have not heretofore had the benefit of the homestead laws.

JAMES M. DEWEESE, JR.

Sworn to and subscribed this thirty-first day of May, 1883, before—
H. W. PARKER,
Register of the Land Office.

In red ink on margin is the following: See note, which clerks of the courts and registers and receivers will read and explain thoroughly to persons making application for lands where the affidavit is made before either of them. (See directions to land officers on duplicate receipt.)

Timber land embraced in a homestead, or other entry not consummated may be cleared in order to cultivate the land and improve the premises, but for no other purpose. If after clearing the land for cultivation there remains more timber than is required for improvement, there is no objection to the settler disposing of
85 the same. But the question whether the land is being cleared of its timber for legitimate purposes is a question of fact which is liable to be raised at any time. If the timber is cut and removed for any other purpose it will subject the entry to cancellation, and the person who cut it will be liable to civil suit for recovery of the value of sai- timber, and also to criminal prosecution under section 2461 of the Revised Statutes.

NOTE.—If this affidavit be acknowledged before the clerk of the court, as provided for by sec. 2294 U. S. Revised Statutes, the homestead party must expressly state herein that he or some member of his family is residing upon the land applied for, and that *bona fide* improvements and settlement have been made. He must also state why he is unable to appear at the land office.

Appeal.

United States Land Office, Beatrice, Nebraska.

In the Matter of the Application of JAMES M. DEWEESE, JR., to Make Homestead Entry on N. E. Qr. Sec. 14, Town. 5, Range 3 East, 6 P. M.

To the Honorable Commissioner of General Land Office:

Now comes James M. Deweese, Jr., and respectfully shows:

That on the 31st day of May, A. D. 1883, he was a citizen of the United States, over twenty-one years of age, and that on said date he made application to the register of the United States land office at Beatrice, Nebraska, for homestead entry of northeast quarter of section fourteen (14), township five (5) N., range three (3) east of the 6" P. M., under section 2289 of Revised Statutes and the act of March 3d, 1879, and for that purpose made affidavit, as required in making homestead entries, that he was a citizen of t-e United States, over twenty-one years of age, and that the entry was made for his exclusive use and benefit and for actual settlement and cultivation, and that he then and there tendered to the said receiver the fees and commissions allowed by statute on making such entries, but that

the said application was rejected by the said register for the reasons that it appeared by the records in his office that said tract of land had been selected by the State of Nebraska on March 26", 1868, and such selection approved by the General Land Office March 29", 1870.

And the said applicant feeling aggrieved at the rejection of his application hereby appeals to the United States General Land Commissioner and sets forth the following points of exception to the decision of said register and the reasons for such exceptions:

86 1st. Said tract of land was and is within the twenty-miles limit of the land grant of the Burlington and Missouri River Railroad Company in Nebraska by act of Congress July 2d, 1864, the grant attaching to the lands covered by the grant on June 15th, 1865, at time the line of the road was definitely fixed.

2d. That thereafter in July, 1865, the said lands within the 20-mile limit were withdrawn from market and the even-numbered sections raised to double-minimum lands, and hence were not subject to private entry under the terms of the act of September 4th, 1841, and the act of March 6th, 1868.

3d. That the selection of said tract of land by the State of Nebraska was made under and by virtue of the act of Sept. 4th, 1841, granting lands to States for internal improvements, to be selected from the lands subject to sale or private entry.

The said applicant therefore says that the said selection by the State of Nebraska of said tract of land and the approval of said selection by the General Land Office was illegal and erroneous, because said land was not subject to such selection.

That said tract of land is and was at the date of said application subject to homestead entry and the register of said land office erred in rejecting said application.

The said applicant therefore prays that the decision of the local land office may be reversed and that said office may be instructed to allow the filing and homestead entry of the applicant on the said tract of land.

Respectfully submitted.

JAMES M. DEWEESE, JR.,
By J. W. DEWEESE,
His Attorney.

Indorsed: In the matter of the homestead application of James M. Deweese, Jr.

* 5120. | * Department of the Interior. L. & R. R. D. W. | * Received Sept. 17, 1883.

Appeal.

[* In red ink in copy.]

87 *Homestead.*

Application.

No. —.

LAND OFFICE AT BEATRICE, NEBRASKA, *May* 31*st*, 1883.

I, Jasper C. Deweese, of Richardson county, Nebraska, do hereby apply to enter under section 2289, Revised Statutes of the United States and the act of Congress approved March 3d, 1879, the northwest quarter of section fourteen, in township five N., of range three east, containing one hundred & sixty acres.

JASPER C. DEWEESE.

[Printed across the face in red ink:] U. S. land office, Beatrice, Nebr., May 1st, 1883. This application is hereby rejected for the reason that the land described was selected by the State of Nebraska, March 26, 1868, which selection was approved M'ch 29, 1870, as per list No. 7. H. W. Parker, register.

LAND OFFICE AT ——, —— —, 188–.

I, —— ——, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

—— ——, *Register.*

Indorsed: No. —. Homestead application. —— —, 188–. Sec. —, town. —, range —.

Homestead.

Affidavit.

LAND OFFICE AT BEATRICE, NEBRASKA, *May* 31*st*, 1883.

I, Jasper C. Deweese, of Dawson, Richardson Co., Nebr., having filed my application, No. —, for an entry under section No. 2289, and the act of Congress approved M'ch 3, 1879, Revised Statutes of the United States, do solemnly swear that I am a citizen of the United States, and am over twenty-one years of age; that said application, No. —, is made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever; and that I have not heretofore had the benefit of the homestead laws.

JASPER C. DEWEESE.

Sworn to and subscribed this thirty-first day of May, 1883, *n*efore—

H. W. PARKER,
Register of the Land Office.

88 In red ink on margin is the following: See note, which clerks of the courts and registers and receivers will read and explain thoroughly to persons making application for lands where the affidavit is made before either of them. (See directions to land officers on duplicate receipt.)

Timber land embraced in a homestead, or other entry not consummated may be cleared in order to cultivate the land and improve the premises, but for no other purpose. If, after clearing the land for cultivation there remains more timber than is required for improvement, there is no objection to the settler disposing of the same. But the question whether the land is being cleared of its timber for legitimate purposes is a question of fact which is liable to be raised at any time. If the timber is cut and removed for any other purpose it will subject the entry to cancellation, and the person who cut it will be liable to civil suit for recovery of the value of said timber, and also to criminal prosecution under section 2461 of the Revised Statutes.

NOTE.—If this affidavit be acknowledged before the clerk of the court, as provided for by sec. 2294, U. S. Revised Statutes, the homestead party must expressly state herein that he or some member of his family is residing upon the land applied for, and that *bona fide* improvements and settlement have been made. He must also state why he is unable to appear at the land office.

Appeal.

United States Land Office, Beatrice, Nebraska.

In the Matter of the Application of JASPER C. DEWEESE to Make Homestead Entry on N. W. Qr. Sec. 14, Town. 5, Range 3 East, 6 P. M.

To the Honorable Commissioner of the General Land Office:

Now comes Jasper C. Deweese and respectfully shows:

That on the 31st day of May, A. D. 1883, he was a citizen of the United States, over twenty-one years of age; and that on said date he made application to the register of the United States land office at Beatrice, Nebraska, for homestead entry of northwest quarter of section fourteen (14), town. five (5), range three (3) east of the 6th P. M. under section 2289 of the Revised Statutes, and the act of March 3rd, 1879, and for that purpose made affidavit, as required in making homestead entries, that he was a citizen of the United States over twenty-one years of age, and that the entry was
89 made for his exclusive use and benefit and for actual settlement and cultivation, and that he then and there tendered to the receiver the fees and commissions allowed by statute on making such entries, but that the said application was rejected by the said register for the reason that it appeared by the records in his office that said tract of land had been selected by the State of Nebraska,

on March 26th, 1868, and such selection approved by the General Land Office March 29th, 1870.

And the said applicant, feeling aggrieved at the rejection of his application, hereby appeals to the United States General Land Commissioner, and sets forth the following points of exception to the decision of said land officer and the reasons for such exceptions:

1st. Said tract of land was and is within the twenty-mile limit of the land grant of the Burlington and Missouri River Railroad Company in Nebraska, by act of Congress July 2nd, 1864, the grant attaching to the lands covered by the grant of June 15th, 1865, at time the line of the road was definitely fixed.

2nd. That thereafter in July, 1865, the said lands within the 20-mile limit were withdrawn from market and the even-numbered sections raised to double-minimum lands and hence were not subject to private entry, under the terms of the act of September 4th, 1841, and the act of March 6th, 1868.

3rd. That the selection of said tract of land by the State of Nebraska, was made under and by virtue of the act of Sep. 4th, 1841, granting lands to States for internal improvements to be selected from lands subject to sale or private entry.

The said applicant therefore says that the said selection by the State of Nebraska of said tract of land, and the approval of said selection by the General Land Office was illegal and erroneous, because said land was not subject to such selection.

That said tract of land is and was at the date of said application subject to homestead entry, and the register of said office erred in rejecting said application.

The said applicant therefore prays that the decision of the local land office may be reversed and that said office may be instructed to allow the filing and homestead entry of the applicant on said tract of land.

Respectfully submitted.

JASPER C. DEWEESE.

90 Indorsed: The matter of homestead application of Jasper C. Deweese. Appeal to General Land Office.

*5120	*Department of the Interior L. & R. R. D. W.	*Received Sept. 17, 1883.

[*In red ink in copy.]

Homestead.

Application.

No. —.

LAND OFFICE AT BEATRICE, NEBRASKA, *May 31st*, 1883.

I, Bernard L. Caster, of Wilber, Saline county, Nebraska, do hereby apply to enter, under section 2289, Revised Statutes of the United

States, the southwest quarter of section fourteen, in township five north of range three east, containing one hundred & sixty acres.

BERNARD L. CASTER.

[Printed across the face in red ink:] U. S. land office, Beatrice, Nebr., May 1, 1883. This application is hereby rejected for the reason that the land described was selected by the State of Nebraska, M'ch 26", 1868, which selection was approved M'ch 29, 1870, as per list No. 7. H. W. Parker, register.

LAND OFFICE AT ——, —— —, 188–.

I, —— ——, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

—— ——, *Register.*

Indorsed: No. —. Homestead application. —— —, 188–. Sec. —, tow*m* —, range —.

Homestead.

(Affidavit.)

LAND OFFICE AT BEATRICE, NEBRASKA, *May* 31*st*, 1883.

I, Bernard L. Castor, of Wilber, Saline county, Nebraska, having filed my application, No. —, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am a citizen of the United States and the head of a family, and over the age of twenty-one years; that said application, No. —, is
91 made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit and not directly or indirectly for the benefit or use of any other person or persons whomsoever, and that I have not heretofore has the benefit of the homestead laws.

BERNARD L. CASTER.

Sworn to and subscribed this 31st day of May, 1883, before—

H. W. PARKER,
Register of the Land Office.

In red ink on margin is the following: See note X, which clerks of the courts and registers and receivers will read and explain thoroughly to persons making application for lands where the affidavit is made before either of them. (See directions to land officers on duplicate receipts.)

Timber land embraced in a homestead or other entry not consummated may be cleared in order to cultivate the land and improve the premises, but for no other purpose. If after clearing the land for cultivation there remains more timber than is required for improvement, there is no objection to the settler disposing of the same. But the question whether the land is being cleared of its timber for

legitimate purposes is a question of fact which is liable to be raised at any time. If the timber is cut and removed for any other purpose it will subject the entry to cancellation, and the person who cut it will be liable to civil suit for recovery of the value of said timber, and also to criminal prosecution under section 2461 of the Revised Statutes.

X NOTE.—If this affidavit be acknowledged before the clerk of the court, as provided for by sec. 2294, U. S. Revised Statutes, the homestead party must expressly state herein that he or some member of his family is residing upon the land applied for, and that *bona fide* improvements and settlement have been made. He must also state why he is unable to appear at the land office.

Appeal.

United States Land Office, Beatrice, Nebraska.

In the Matter of the Application of BERNARD L. CASTOR to Make Homestead Entry on the S. W. Qr. of Sec. 14, Town. 5, Range 3 East, of 6" P. M.

To the Honorable Commissioner of the General Land Office:

Now comes Barnard L. Castor and respectfully show- that on the 31st day of May, A. D. 1883, he was a citizen of the United
92 States over twenty-one years of age, and that on said date he made application to the register of the United States land office at Beatrice, Nebraska, for homestead entry of southwest quarter of sec. (14) fourteen, town. five (5), range three (3) east of the 6" P. M., under section 2289 of the Revised Statutes and the act of March 3d, 1879, and for that purpose made affidavit as required in making homestead entries that he was a citizen of the United States over twenty-one years of age, and that the entry was made for his exclusive use and benefit and for actual settlement and cultivation, and that he then and there tendered to the receiver the fees and commissions allowed by statute on making such entries, but that the said application was rejected by the said register for the reason that it appeared by the records in his office that said tract of land had been selected by the State of Nebraska on March 26th, 1868, and such selection approved by the General Land Office March 29th, 1870, and the said applicant, feeling aggrieved at the rejection of his application, hereby appeals to the United States General Land Commissioner and sets forth the following points of exception to the decision of said register and the reasons for such exceptions:

1st. Said tract of land was and is within the twenty-mile limit of the land grant of the Burlington and Missouri River Railroad Company in Nebraska by act of Congress July 2d, 1864, the grant attaching to the land covered by the grant on June 15", 1865, at the time the line of the road was definitely fixed.

2d. That thereafter, in July, 1865, the said lands within the 20-mile limit were withdrawn from market and the even-numbered sections raised to double-minimum lands and hence were not sub-

ject to private entry under the terms of the act of September 4th, 1841, and the act of March 6th, 1868.

3d. That the selection of said tract of land by the State of Nebraska was made under and by virtue of the act of Sept. 4th, 1841, granting lands to States for internal improvements to be selected from lands subject to sale or private entry.

The said applicant therefore says that the said selection by the State of Nebraska of said tract of land, and the approval of said selection by the General Land Office, was illegal and erroneous because said land was not subject to such selection.

That said tract of land is and was at the date of said application subject to homestead entry and the register of said land office erred in rejecting said application.

93 The said applicant therefore prays that the decision of the local land office may be reversed and that said office may be instructed to allow the filing and homestead entry of the applicant on said tract of land.

Respectfully submitted.

BERNARD L. CASTOR,
By TOBIAS CASTOR, *His Att'y.*

Indorsed: In the matter of homestead application of Bernard L. Castor.

* 5120	* Department of the Interior L. & R. R. D. W.	* Received Sept. 17, 1883.

[* In red ink in copy.]

Homestead.

Application.

No. —.

LAND OFFICE AT BEATRICE, NEBRASKA, *May* 31*st*, 1883.

I, Mary E. Brolliar, of Wilber, Saline county, Nebraska, do hereby apply to enter, under section 2289, Revised Statutes of the United States and the act of Congress approved March 3d, 1879, the south-east quarter of section fourteen, in township five N., of range three east, containing one hundred & sixty acres.

MARY E. BROLLIAR.

[Printed across the face in red ink:] U. S. land office, Beatrice, Nebr., May 1", 1883. This application is hereby rejected for the reason that the land described was selected by the State of Nebraska M'ch 26", 1868, which selection was approved M'ch 29, 1870, as per list No. 7. H. W. Parker, register.

LAND OFFICE AT ——, —— —, 188–.

I, —— ——, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

—— ——, *Register.*

Indorsed: No —. Homestead application. —— —, 188–. Sec. —, town. —, range —.

94 *Homestead.*

Affidavit.

LAND OFFICE AT BEATRICE, NEBRASKA, *May 31st*, 1883.

I, Mary E. Brollier, of Wilber, Saline county, Nebr., having filed my application, No. —, for an entry under section No. 2289, Revised Statutes of the United States, do solemnly swear that I am a citizen of the United States and over twenty-one years of age; that said application, No. —, is made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever, and that I have not heretofore had the benefit of the homestead laws.

MARY E. BROLLIAR.

Sworn to and subscribed this 31st day of May, 1883, before—

H. W. PARKER,
Register of the Land Office.

On margin in red ink is the following: See note X, which clerks of the courts and registers and receivers will read and explain thoroughly to persons making applications for lands where the affidavit is made before either of them (see directions to land officers on duplicate receipts).

Timber land embraced in a homestead or other entry not consummated may be cl-ared in order to cultivate the land and improve the premises, but for no other purpose. If after clearing the land for cultivation there remains more timber than is required for improvement, there is no objection to the settler disposing of the same; but the question whether the land is being cleared of its timber for legitimate purposes is a question of fact which is liable to be raised at any time. If the timber is cut and removed for any other purpose it will subject the ectry to cancellation, and the person who cut- it will be liable to civil suit for recovery of the *whole* of said timber, and also to criminal prosecution under section 2461 of the Revised Statutes.

X NOTE.—If this affidavit be acknowledged before the clerk of the court, as provided for by sec. 2294, U. S. Revised Statutes, the homestead party must expressly state herein that he or some member of his family is residing upon the land applied for, and that

bona fide improvements and settlement have been made. He must also state why he is unable to appear at the land office.

95 United States Land Office, Beatrice, Nebraska.

In the Matter of the Application of MARY E. BROLLIAR to Make Homestead Entry on S. E. ¼ Section 14, Township 5 N., of Range 3 East, 6 P. M.

To the Hon. Land Commissioner of the General Land Office:

Now comes Mary E. Brolliar and respectfully shows:

That on the 31st day of May, A. D. 1883, she was a citizen of the United States over twenty-one years of age and that on said date she made application to the register of the United States land office at Beatrice, Nebraska, for a homestead entry of southeast quarter of section fourteen (14), township five (5) N., of range three (3) east, 6 P. M., under section 2289 of Revised Statutes and the act of March 3rd, 1879, and for that purpose made affidavit, as required in making homestead entries, that she was a citizen of the United States over twenty-one years of age, and that the entry was made for her exclusive use and benefit and for actual settlement and cultivation, and that she then and there tendered to the said receiver the fees and commissions allowed by statutes on making such entries, but that said application was rejected by the said register for the reason that it appeared by the records in his office that said tract of land had been selected by the State of Nebraska on March 26th, 1868, and such selections approved by the Gen. Land Office March 29th, 1870, and the said applicant feeling aggrieved at the rejection of her application hereby appeals to the United States General Land Commissioner and sets forth the following points of exception to the decision of said register and the reasons for such exceptions:

1st. Said tract of land was and is within the twenty-mile limit of the land grant of the Burlington and Missouri River Railroad Company in Nebraska by act of Congress July 2nd, 1864, the grant attaching to the lands covered by the grant on June 15, 1865, at the time the road was definitely fixed.

2nd. That thereafter, in July, 1865, the said lands within the 20-miles limit *was* withdrawn from market and the even-numbered sections raised to double-minimum lands, and hence were not subject to private entry under the terms of the act of September 4th, 1841, and the act of March 6th, 1868.

3rd. That the selection of said tract of land by the State of Nebraska was made under and by virtue of the act of Sept. 4th, 1841, granting lands to — State for internal improvement, to be selected from lands subject to sale or private entry.

96 The said applicant therefore says that the said selection by the State of Nebraska of said tract of land, and the approval of said selection by the General Land Office was illegal and erroneous, because said land was not subject to such selection.

That said tracts of land is and was at the date of said application

subject to homestead entry and the register of said land office erred in rejecting said application.

The said applicant therefore prays that the decision of the land office may be reversed and that said office may be instructed to allow the filing and homestead entry of the applicant on the said tract of land.

Respectfully submitted.

MARY E. BROLLIAR,
By TOBIAS CASTOR,
Her Attorney.

Indorsed: In the matter of the homestead application of Mary E. Brolliar.

* 5120	* Department of the Interior L. & R. R. D. W.	* Received Sept. 17, 1883.

[* In red ink in copy.]

(Refer in reply to this initial "G.")

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 7th*, 1883.

Register and receiver, Beatrice, Neb.

GENTLEMEN: I have considered the application of James M. Deweese *et al.* to make homestead entries upon section 14, T. 5 N., range 3 E., 6 P. M., transmitted with your letter of the 18th ultimo, on appeal from your decision rejecting the same for the reason that the records of your office show that said section was selected by the State of Nebraska March 26, 1868, in part satisfaction of the internal improvement grant act of Sept. 4, 1841, and that said selection was approved by the Secretary of the Interior Mar. 29, 1870, per clear list No. 7.

The records of this office show that the above-described tract was selected and approved as stated; also that a certified transcript of the approved list (No. 7) conveying the fee-simple title to the land embraced therein, was transmitted to the governor of the State under date of April 7th, 1870.

97 It is further shown that said section 14, T. 5 N. Range 3 E. was on the dates mentioned, and now is an even section within the 20-miles limits of the grant of the Burlington and Missouri River Railroad Co., by act of Congress approved July 2, 1862, referring to which the Honorable Secretary of the Interior (Cox), in his decision of July 5th, 1870, states as follows:

"I have carefully considered your letter of the 28th ult., and the papers therewith transmitted in relation to the claim of the State of Nebraska under the internal-improvement grant of the 4th of Sep-

tember, 1841, to parcels of land situate in the alternate even-numbered sections lying within the limits of the grant made by act of July 2nd, 1864, to the B. & M. R. Railroad Co.," "In addition to the views which you have presented, I remark that such sections are rated at $2.50 per acre, and by the act of March 6, 1868, (Stats., vol. 15, p. 39), which was in force when most of the land- in question were selected by the agents of the State, are subject to entry only under the homestead or pre-emption laws."

"I concur with you in opinion that such sections or parts of sections were not selected pursuant to law and cannot be certified to the State."

The principle involved in the above decision has been universally held by this office to apply to all double-minimum lands except where otherwise provided by act of Congress; hence it must be conceded that the selection, approval and certification of said tract to the State was erroneous. In view of the fact, however, that the land has been patented to the State (a transcript of the approved list under seal of this office in the hands of the governor being equivalent to a patent), and that the grant for internal *approvement* has been declared closed, the full quantity of 500,000 acres to which it was entitled having been approved and certified, I am of the opinion that said land is not subject to entry and will not be so subject until the title vested in the State by the approval and certification of said tract has been reconveyed to the United States, and the selection duly canceled on the records of this and the local office.

Your decision rejecting the applications of James M. Deweese, Jr., Jasper C. Deweese, Mary E. Brailliar and Bernard
98 L. Castor to enter the N. E. ¼, N. W. ¼, S. E. ¼ and S. W. ¼, sec. 14, T. 5 N., R. 3 E. is therefore affirmed.

Notify the parties accordingly, and allow the usual time for appeal.

Very respectfully,

(Sig.) N. C. McFARLAND,
Commissioner.

In the Matter of the Application of JAMES M. DEWEESE, JR., to File Homestead Claim on the Northeast Quarter of Sec. 14, Town. 5, Range 3 East, of 6 Principal M.

Now comes James M. Deweese, Junior, and respectfully appeals to the Honorable Secretary of the Interior, from the decision of the General Land Commissioner made July 7, 1883, affirming the decision of the register and receiver of the United States land office at Beatrice whereby the application of the said Deweese to file homestead claim, on the northeast quarter of sec. 14, town. 5, range 3, east of 6 P. M. was rejected. And the appel-ant herein submits and specifies the following points of exception, to the decision of the General Land Commissioner.

(1) It is claimed by the appel-ant and seems to be conceeded by the General Land Commissioner, that the land in question was an even section of double-minimum land, being within the 20-mile

limit of the railroad grant to the Burlington & Missouri River Railroad Company in Nebraska, and hence was not subject to private entry.

That said section was selected by the State of Nebraska, on March 26, 1868, in part satisfaction of the internal-improvement grant, act of September 4, 1841, and that said land not being subject to private entry, said selection was erroneous and illegal.

The appel-ant excepts to the decision of the Land Commissioner to the effect that the land has been patented to the State in pursuance of the selection made by the agent of the State, and that the grant for internal improvements had been closed. That said land was not subject to entry, and will not be subject to homestead entry, until the selection by the State is duly canceled on the records of the General Land Office.

The reason of this exception is based upon the position that if the selection by the State and the patenting of the land to the State, was erroneous and illegal, the State acquired no rights by virtue thereof, and the status of the land was not affected by the erroneous and illegal selection and certification.

99 2. Appellant excepts for the further reason that it appears by the records of the General Land Office that the full amount of 500,000 that the Stste of Nebraska was entitled to under the internal-improvement act had been selected and certified to the State prior to the selection of the land in question.

3. Appellant further excepts to the decision of the Land Commissioner, for the reason that the fact that the land had been patented to the State under its selection, would not change the legal status of the land, if such selection and patenting were erroneous and illegal.

All grants made by Congress are strictly construed against the grantees.

Nothing passes but what is conveyed in clear and explicit language.

Nothing will be taken by implication.

See Dubuque & Pacific R. R. against Litchfield, 23 Howard Reports, page 88.

Appellant prays that the decision of the Hon. Land Commissioner may be reversed and the land office of Beatrice instructed to receive the fees tendered and allow the filing.

JAMES M. DEWEESE, JR.,
By J. W. DEWEESE,
His Attorney.

In the Matter of the Application of JASPER C. DEWEES- to File Homestead Claim on the Northwest Quarter of Sec. 14, T. 5, Range 3 East, of 6 P. M.

Now comes Jasper C. Deweese and respectfully appeals to the Honorable Secretary of the Interior from the decision of the General Land Commissioner made July 7, 1883, affirming the decision of the register and receiver of the United States land office at Beatrice, whereby the application of the said Deweese to file homestead claim

on the northwest quarter of sec. 14, town. 5, range 3 east of 6 P. M. was rejected, and the appellant herein submits and specifies the following points of exception to the decision of the General Land Commissioner:

1. It is claimed by the appellant and seems to be conceded by the General Land Commissioner, that the land in question was an even section of double-minimum land, being within the 20-mile limit of the railroad grant to the Burlington & Missouri River Railroad Company in Nebraska, and hence was not subject to private entry.

100 That said section was selected by the State of Nebraska on March 26, 1868, in part satisfaction of the internal-improvement grant act of Sept. 4, 1841, and that said land not being subject to private entry, said selection was erroneous and illegal.

The appellant excepts to the decision of the Land Commissioner to the effect that the land had been patented to the State in pursuance of the selection made by the agent of the State, and that the grant for internal improvement had been closed. That said land was not subject to entry, and will not be subject to homestead entry, until the selection by the State is duly canceled on the records of the General Land Office.

The reason of this exception is based upon the position that if the selection by the State and the patenting of the land to the State, was erroneous and illegal, the State acquired no rights by virtue thereof, and the status of the land was not affected by the erroneous and illegal selection and certification.

2. Appellant excepts for the further reason that it appears by the records of the General Land Office that the full amount of 500,000 acres that the State of Nebraska was entitled to under the internal-improvement act had been selected and certified to the State prior to the selection of the land in question.

3. Appellant further excepts to the decision of the Land Commissioner, for the reason that the fact that the land has been patented to the State under its selection, would not change the legal status of the land, if such selection and patenting were erroneous and illegal.

All grants made by Congress are strictly construed against the grantees.

Nothing passes but what is conveyed in clear and explicit language.

Nothing will be taken by implication.

See Dubuque & Pacific R. R. *vs.* Litchfield, 23 Howard Reports, page 88.

Appellant prays that the decision of the Hon. Land Commissioner may be reversed and the land office of Beatrice instructed to receive the fees tendered and allow the filing.

JASPER C. DEWEESE,
By J. W. DEWEESE,
His Attorney.

101 In the Matter of the Application of Bernard L. Castor to File Homestead Claim on the Southwest Quarter of Sec. 14, Town. 5, Range 3 East, of 6 P. M.

Now comes Bernard L. Castor, and respectfully appeals to the Honorable Secretary of the Interior, from the decision of the General Land Commissioner, made July 7, 1883, affirming the decision of the register and receiver of the United States land office at Beatrice, Nebr., whereby the application of the said Castor, to file homestead claim, on the southwest quarter of sec. 14, town. 5, range 3 east of 6 P. M. was rejected, and the appellant herein submits and specifies the following points of exception to the decision of the General Land Commissioner:

1. It is claimed by the appellant and seems to be conceded by the General Land Commissioner, that the land in question was an even section of double-minimum land, being within the 20-mile limit of the railroad grant to the Burlington & Missouri River Railroad Company in Nebraska, and hence was not subject to private entry.

That said section was selected by the State of Nebraska, on March 26, 1868, in part satisfaction of the internal-improvement grant, act of Sept. 4, 1841, and that said land not being subject to private entry, said selection was erroneous and illegal.

The appellant excepts to the decision of the General Land Commissioner, holding that the land had been patented to the State, in pursuance of the selection made by the State, and that the grant for internal improvements had been closed. That said land was not subject to entry, and will not be subject to homestead entry, until the selection by the State is duly canceled on the records of the General Land Office.

The reason of the exception is based upon the position, that if the selection by the State and the patenting of the land to the State was erroneous and illegal, the State acquired no rights by virtue thereof, and the status of the land was not affected by the erroneous and illegal selection and certification.

2. Appellant excepts for the further reason that it appears by the records of the General Land Office that the full amount of 500,000 acres that the State of Nebraska was entitled to under the internal-improvement act had been selected and certified to the State prior to the selection of the land in question.

102 3. Appellant further excepts to the decision of the Land Commissioner, for the reason that the fact that the land had been patented to the State under its selection would not change the legal status of the land, if such selection and patenting were erroneous and illegal.

All grants made by Congress are strictly construed against the grantees.

Nothing passes but what is conveyed in clear and explicit language.

Nothing will be taken by implication.

See Dubuque & Pacific R. R. against Litchfield 23 Howard Reports, page 88.

Appellant prays that the decision of the Hon. Land Commissioner may be reversed and the land office of Beatrice, Nebr., instructed to receive the fees tendered and allow the entry.

BERNARD L. CASTOR,
By TOBIAS CASTOR, *His Att'y.*

In the Matter of the Application of MARY E. BROLLIAR to File Homestead Claim on the Southeast Quarter of Sec. 14, T. 5, R. 3 East, of 6 P. M.

Now comes Mary E. Brolliar, and respectfully appeals to the honorable Secretary of the Interior from the decision of the General Land Commissioner, made July 7, 1883, affirming the decision of the register and receiver of the United States land office at Beatrice, Nebr., whereby the application of the said Brolliar to file homestead claim, on the southeast quarter of sec. 14, town 5, range 3 east of 6 P. M. was rejected. And the appellant herein submits and specifies the following points of exceptions, to the decision of the General Land Commissioner:

1. It is claimed by the appellant and seems to be conceded by the General Land Commissioner, that the land in question was an even section of double-minimum land, being within the 20-mile limit of the railroad grant to the Burlington & Missouri River Railroad Company in Nebraska, and hence was not subject to private entry. That said section was selected by the State of Nebraska on March 26, 1868, in part satisfaction of the internal-improvement grant act of Sept. 4, 1841, and that said land not being subject to private entry, said selection was erroneous and illegal.

103 The appellant excepts to the decision of the Land Commissioner holding that the land had been patented to the State in pursuance of the selection made by the agent of the State, and that the grant for internal improvements had been closed. That said land was not subject to entry and will not be subject to homestead entry, until the selection by the State is duly canceled on the records of the General Land Office.

The reason of this exception is based upon the position that if the selection by the State and the petenting of the land to the State, was erroneous and illegal, the State acquired no rights by virtue thereof, and the status of the land was not affected by the erroneous and illegal selection and certification.

2. Appellant excepts for the further reason that it appears by the records of the General Land Office, that the full amount of 500,000 acres that the State of Nebraska, was entitled to under the internal-improvement act, had been selected and certified to the State, prior to the selection of the land in question.

3. Appellant further excepts to the decision of the General Land Commissioner, for the reason that the fact that the land had been patented to the State under its selection, would not change the legal status of the land, if such selections and patenting were erroneous and illegal.

All grants made by Congress are strictly construed against the grantees.

Nothing passes but what is conveyed in clear and explicit language.

Nothing will be taken by implication.

See Dubuque & Pacific R. R. against Litchfield, 23 Howard Reports, page 88.

Appellant prays that the decision of the Hon. Land Commissioner may be reversed and the land office of Beatrice instructed to receive the fees tendered and allow the said entry.

MARY E. BROLLIAR,
By TOBIAS CASTOR, *Her Att'y.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Jan'y* 18, 1884.

To the Commissioner of the General Land Office.

SIR: I have examined the case presented by the appeal of James M. Deweese, *et al.*, from your decision of July 7, 1883,
104 rejecting the applications of said parties to make homestead entries upon sec. 14, t'p 5 N., R. 3 E., Beatrice, Nebraska.

It appears from the records of your office that said section fourteen was selected by the State of Nebraska, March 26, 1868, in part satisfaction of the grant of lands made to said State for internal improvements Sept. 4th, 1841. (5 Stat., 453.) That said selection was approved by the Secretary of the Interior, March 29, 1870, in "clear list" No. 7, and that a certified transcript of such approved list was transmitted to the Governor of said State, April 7, 1870.

May 31, 1883, the applicants presented to the local office their applications to make homestead entries upon said section.

The applications were rejected on account of the prior disposition of the lands to the State, as shown by the record, and you affirm such rejection.

It is urged by the appellants that at the time when the State selected this section it was not subject thereto, because it was double-minimum land, being an even-numbered section within the limits of the grant to the Burlington and Missouri River Railroad Company, by the act of July 2nd, 1862, and that therefore the certification thereof by the State was erroneous and passed no title. The approval and certification of this land to the State was a final adjudication of all questions pertaining to the title thereto so far as this department is concerned, and you very properly refuse to permit said entries to be made.

Your decision is therefore affirmed.

The papers accompanying your letter of August 27, 1883, are herewith returned.

Very respectfully, H. M. TELLER, *Secretary.*

(Copy.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan'y* 25, '84.

Register & receiver, Beatrice, Neb.

GENTLEMEN: You are hereby advised that on the 18th instant the Honorable Secretary of the Interior affirmed the decision
105 of this office of July 7th, 1883, in case of applications of James M. Deweese, *et al.*, to make homestead entries upon section 14, t'p 5 N., R. 3 E., Nebraska.

This action closes the case, and the said applications are thereby rejected. Advise the parties in interest of the decision, a copy of which is herewith enclosed.

Very respectfully, N. C. McFARLAND,
Commissioner.

(Copy.)

LINCOLN, NEBRASKA, *April 25th*, 1884.

In the Matter of the Homestead Entries of JAMES M. DEWEESE, JASPER C. DEWEESE, BERNARD L. CASTOR, and MARY E. BROILLIAR.

To the Honorable Secretary of the Interior, Washington, D. C.

SIR: On May 31st, 1883, the above-named parties respectively made homestead filings on the four separate quarters of section fourteen, town. five, range three east, in the district land office at Beatrice, Nebraska. The local officers refused to approve the filings thus made, because the land appeared to have been already selected by the State of Nebraska, under the internal-improvement act, of September 4th, 1841. From their decision these parties appealed to the Commissioner of the General Land Office, who decided against the homestead claimants and approved the action of the local officers, by letter of July 7th, 1883, a copy of which is hereto attached. From this decision these parties appealed to the honorable Secretary of the Interior, whose decision was rendered against these applicants January 18th, 1884, as appears by copy of letter hereto attached.

These claimants now respectfully petition the honorable Secretary for a rehearing of their claims, and beg leave to refer the honorable Secretary to section 2449 of chapter 11, title 32, of the Revised Statutes of the United States, which is as follows: "Where lands have been or may hereafter be granted by any law of Congress to any one of the several States & Territories, and where such law does not convey the fee-simple title of lands or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the Gen-
106 eral Land Office, under the seal of his office, either as originals or copies of the originals or records, shall be regarded

as conveying the fee-simple of all the lands embraced in such lists, that are of the character contemplated by such act of Congress and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

That the selection of these lands by the State of Nebraska, under the internal-improvement act, was illegal or erroneous, does not seem to be questioned, either by the honorable Secretary or the honorable Land Commissioner. But the land having been selected by the State through some error, and having been approved by the Land Department, it is decided by the honorable Secretary that, so far as the Land Department is concerned, the approval of the selection was final.

We concede that this is the true rule, where lands are really patented by the Government; but it seems clear that the statute above quoted makes a distinction between the actual patenting of lands and the mere approval and certification of lands selected, unless the selection is of lands of the character contemplated by the act. That these lands are not of this character, we presume, is not questioned, and hence that the selection by the State and approval by the Land Department carries no title and is utterly null and void. It would seem clear, then, that these lands are subject to homestead and pre-emption entry.

We make this application for a rehearing, believing that this statute may have been overlooked, and for the further reason that the courts of law seem to afford no adequate remedy to the applicants.

The applicants therefore pray, that the honorable Secretary may reconsider the ruling, as made January 18th, 1884, and that the same may be reversed and the local officers be directed to entertain the homestead filing of the applicants and issue to them receipts for the fees and enter their filings upon the records of the office, as required by law.

J. W. DEWEESE,
Att'y for Homestead Claimants.

107 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *June* 25, 1884.

The Commissioner of the General Land Office.

SIR: I have considered the motion for review, filed on behalf of James M. Deweese *et al.*, asking a reconsideration of my decision of January 18, 1884 (10 Copp's L. O., p. 359), wherein I rejected the applications of said parties to make homestead entries upon sec. 14, t'p 5 N., R. 3 E., Beatrice, Nebraska.

The applications to enter were rejected because the land covered by such applications had been selected by the State of Nebraska under the grant of September 4, 1841, (5 Stat. 453,) and such selection approved prior to the time when said applications were made.

It was argued by the attorney for applicants that as this tract was double-minimum land at the date of selection, and consequently not subject to such selection, the certification passed no title to the State.

It is now suggested that my decision did not take into consideration the provisions of section 2449 of the Revised Statutes, which provides in substance that when lands embraced within certified lists are not of the character contemplated by the granting act that said lists, so far as such lands are concerned, shall be null and void, and no right, title, claim or interest shall be conveyed thereby.

The effect of a certification under similar circumstances was considered by me in the recent case of the Twin Lake Consolidated Placer Mining Company, (1 Brainard's Legal Precedents, p. 367.)

In that case the selection and certification were under said act of September 4, 1841, but as the selected land was subsequently found to be mineral, it is urged that under said section 2449 no title passed to the State of Colorado by the certification.

I refused, however, to disturb the former adjudication and said that the title created by the certification could only be considered by the courts in due course of law.

The motion is therefore denied, and the papers submitted in support thereof are transmitted herewith.

Very respectfully, H. M. TELLER, *Secretary.*

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108 EXHIBIT "C ½."

Lists of lands selected in the Brownville, now Beatrice, district, State of Nebraska, by R. B. Presson, duly authorized agent of the said State, in pursuance of the 8th section of an act of Congress approved September 4, 1841, entitled "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," amounting in the aggregate to 199,823.25 acres, said lands being subject to be selected for the said purpose and found to be free from conflict.

Date of selection.	No. of list.	Description of tracks.	Section.	Township.	Range.	Area selected.		Area charged to State.	
						Acres.	*Hdths.*	*Acres.*	*Hdth.*
1868.		x	x	x	x	x	x	x	x
March 26.	7	All of	14	5	3 E.	640	00	640	00
		x	x	x	x	x	x	x	x

Remarks.

GENERAL LAND OFFICE, *March* 23, 1870.

The above tracts have been carefully examined with the records of this office & are found free from conflict and as inureing to the State of Nebraska for the purposes indicated.

W. K. MENDE-HALL, *C'lk.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 24", 1870.

I hereby certify that the tracts of lands in the foregoing lists are embraced in the original lists of lands selected by the duly authorized agents of the State of Nebraska under the provisions of the act of Congress approved September 4, 1841, entitled "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," which original lists are on file in this office.

And I further certify that the same have been carefully examined and compared with the township plats and tract books of this office, and are found to be free from conflict; and I respectfully recommend that the same be approved, subject to any valid interfering rights which may have existed at the date of selection.

JOS. S. WILSON,
[SEAL.] *Commissioner.*

DEPARTMENT OF THE INTERIOR, 29 *March*, 1870.

Approved subject to all the rights above mentioned.

J. D. COX, *Secretary.*

109 "EXHIBIT D."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 17", 1889.

I, W. M. Stone, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of so much of the diagram of withdrawal for the Burlington and Missouri River Railroad in Nebraska, as pertains to that portion of the company's grant in Nebraska, lying between the eastern boundary of the State and the west line of range one (1) east, is a true and literal exemplification from the original prepared by and now on file in this office.

Seal of the United States General Land Office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. STONE,
Acting Commissioner of General Land Office.

(Here follows map marked page 110.)

111 EXHIBIT "D ½."

List exhibiting the tracts of public land situated in the Brownville, now Beatrice, district, which have been selected for the State of Nebraska under the provisions of the 8th section of the act of Congress approved 4th September, 1841, entitled "An act to appropriate the proceeds of the sales of public lands, and to grant pre-emption rights."

Date of selection, M'ch 26, 1868.
All of section 14, town. 5, range 3 east.

Recapitulation.

Brownville, now Beatrice	199,823.25 acres
Omaha, now West Point	159,844.81 "
Total	359,708.06 "

GENERAL LAND OFFICE, *March* 23, 1870.

The above tracts have been carefully examined with the records of this office and are found free from conflict and as inuring to the State of Nebraska for the purposes indicated.

W. K. MENDENHALL, *Clerk.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March 24th*, 1870.

I hereby certify that the tracts of land in the foregoing lists are embraced in the original lists of lands selected by the duly authorized agents of the State of Nebraska under the provisions of the act of Congress approved September 4, 1841, entitled "An act to appropriate the proceeds of the sales of the public lands and to grant preemption rights;" which original lists are on file in this office.

And I further certify that the same have been carefully examined and compared with the township plats and tract books of this office and are found to be free from conflict; and I respectfully recommend that the same be approved subject to any valid interfering rights which may have existed at the date of selection.

[SEAL.] JAS. S. WILSON,
Commissioner.

DEPARTMENT OF THE INTERIOR, 29*th March*, 1870.

Approved subject to all the rights above mentioned.

J. D. COX, *Secretary.*

112 NEBRASKA STATE LAND OFFICE, *November 9th*, 1891.

I, A. R. Humphrey, commissioner of public lands and buildings of the State of Nebraska, do hereby certify that the annexed is a true and literal exemplification of the confirmation of all of section 14, town. 5, range 3 east, containing 640 acres, by the General Government to the State of Nebraska, as shown by the list on file in this office.

Seal of the Nebraska State Land Office.

In testimony whereof I have hereunto set my hand and affixed the seal of this office, at the city of Lincoln, on the day and year above written.

A. R. HUMPHREY,
Commissioner of Public Lands and Buildings,
By BRAD. P. COOK,
Chief Clerk.

Attached to said testimony are exhibits in words and figures following, to wit:

EXHIBIT E.

(Copy.)

State of Nebraska to all to whom these presents shall come, Greeting:

Whereas the Midland Pacific Railway Company's railroad corporation organized and existing under the laws of the State of Nebraska, has become entitled to receive one hundred thousand acres of land under the provisions of the act of the legislature of said State entitled "An act to dispose of the public lands granted to the State of Nebraska for works of public improvements," approved February 15th, 1869, as appears from the report of commission-s duly appointed by the governor of said State to examine and make report to him in relation to the railroad built by said corporation, in which report it is shown that after the 15th day of February, A. D. 1870, the said railroad corporation had built and constructed ten consecutive miles of its railroad in the manner required by an act of the legislature aforesaid, beginning at the west bank of the Missouri river in Nebraska City, in the county of Otoe, in the State of Nebraska, and that said Midland Pacific Railway Company has since the time first above mentioned constructed, as
113 required by the act aforesaid, fifty consecutive miles of said railroad with all necessary grading, drains, culverts, viaducts, crossings, sidings, bridges, turnouts and rails, complete in every respect and ready for the rolling stock, in the State of Nebraska, and that the said fifty consecutive miles were duly examined, accepted and approved by commissioners duly appointed according to the act aforesaid, before the 20th day of April, A. D. 1871, and whereas for the causes aforesaid the governor, secretary of state, and auditor of the said State of Nebraska have caused to be selected and set apart to the said railroad company one hundred thousand acres of land hereinafter more particularly described to the end that letters patent may be issued for the same.

Now, therefore,

Know ye that the State of Nebraska in consideration of the premises and in conformity with the act of the legislature aforesaid hath given and granted and by these presents doth give and grant unto the Midland Pacific Railway Company the lands selected and set apart as aforesaid and which enured to the said State under the act of Congress of September 4th, 1841, situate in the counties of Gage, Jefferson, Nuckolls, Webster, Franklin, Stanton, Colfax and Platte, described as follows, to wit: * * *

In township five (5) north of range three east of the sixth principal meridian. All of section fourteen (14), containing six hundred and forty (640) acres.

To have and to hold the lands above described, with all the rights, privileges and appurtenances to the same belonging, or appertaining unto the said Midland Pacific Railway Company and to its successors and assigns forever.

In testimony whereof I, Wm. H. James, acting governor
[SEAL.] of the said State of Nebraska, have caused these letters to be made patent and the great seal of the State of Nebraska to be hereunto affixed. Done at Lincoln this twentieth day of April, in the year of our Lord one thousand eight hundred and seventy-one, of the Independence of the United States the ninety-fifth and of this State the fifth.

WILLIAM H. JAMES.

By the acting governor:
WILLIAM H. JAMES,
Secretary of State.

STATE OF NEBRASKA, } ss:
County of Gage, }

I, Daniel E. Marsh, clerk of the county court and *ex officio* recorder in and for the county and State aforesaid, do hereby certify that the above deed was filed for record on the 25th day of April, A. D. 1871, at 8 o'clock a. m., and duly recorded in Deed Record "G" on pages 527, 528, 529, 530, 531, 532, 533, 534, 535, 536 and 537.

[SEAL.] In testimony whereof I have hereunto set my hand and affixed the seal of said court the day and date aforesaid.

DANIEL E. MARSH, *Clerk,*
By WM. D. COX, *Deputy.*

State of Nebraska, Colfax county.

This instrument was filed for record on the 19th day of May, A. D. 1871, at 9 o'clock a. m., and duly recorded in Book "B" of Deeds, page one (1).

[SEAL.] In witness whereof I have hereunto set my hand and seal of said county the date aforesaid.

J. W. F. WILLIAMS,
County Clerk.

STATE OF NEBRASKA, } ss:
County of Jefferson, }

I, J. Y. Byers, clerk of the county court and *ex officio* recorder in and for the county and State aforesaid, do hereby certify that the within deed was filed for record on the 26th day of April, A. D. 1871, at 12 o'clock m., and duly recorded in Deed Record E on pages 275, 276, 277, 278, 279, 280, 281, 282, 283, 285, 286, 287 and 288.

[SEAL.] In testimony whereof I have hereunto set my hand and affixed the seal of said county the day and date aforesaid.

J. Y. BYERS,
By BENJ. L. PURDY, *Deputy.*

STATE OF NEBRASKA, } ss:
Platte County, }

This instrument was filed for record on this 1st day of May,
115 1871, at 10 o'clock a. m., and duly recorded in Deed Record "D," pages 377, 378, 379, '80, '81, '82, '83, '84, '85, '86, '87, '88, 389, 390, '91 & '92.

Witness my hand and county seal the date and year
[SEAL.] aforesaid.

H. J. HUDSON,
Co. Clerk of Platte County, Nebr.

STATE OF NEBRASKA, } ss:
Stanton County, }

Filed for record this 2nd day of May, 1871, at 6 o'clock p. m. and recorded in Book A of Deeds, pages 218, 219, 220, 221, 222, 223, 224, 225, 226, 227.

Witness my hand and seal of said county the day and
[SEAL.] year aforesaid.

CORNELIUS NYE,
County Clerk, Stanton County, Nebr.

STATE OF NEBRASKA, } ss:
Webster County, }

Entered on the numerical index and filed for record Oct. 5th, 1878, at 4.15 o'clock p. m. and recorded in Book "D" of Deeds, pages 52 to 60 inclusive.

[SEAL.] J. A. TULLEYS, *Co. Clerk.*

Fees: $6.00.

STATE OF NEBRASKA, } ss:
Franklin County, }

Entered on the numerical index and filed for record March 4th, A. D. 1881, at 4 o'clock p. m. and recorded in Book 5 of *of* Deeds on pages 177 to 184 inclusive.

M. P. MAHIN,
County Clerk.

Said deed is indorsed on the back as follows: Patent. State of Nebraska to Midland Pacific railway, 20th April, 1871.

EXHIBIT "F."

This indenture made this sixth day of November, A. D. 1871, by and between the Midland Pacific Railway Company a corpo-
116 ration under the laws of the State of Nebraska, by Benjamin E. Smith, president of said railway company of the first part and Joel N. Converse of the county of Randolph and State of Indiana of the second part.

Witnesseth, that the said party of the first part in consideration of the sum of one hundred and twenty-five thousand dollars ($125,000.00) lawful money of the United States to them paid by the said party of the second part, at or before the ensealing or delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise,

release, convey and confirm unto the said party of the second part and to his heirs and assigns forever, all their right, title and interest in the following-described tracts and parcels of land situate in the counties of Gage, Jefferson, Thayer, Nuckolls, Webster, Franklin, Madison, Colfax and Platte, in the State of Nebraska described as follows, to wit:

Omitting various descriptions the deed conveyed all of sec. 14, town. 5, range 3, Saline Co., Neb.

In township five (5) north of range seven (7) east of the sixth principal meridian.

All of section seven (7) containing six hundred and forty-eight and forty one-hundred-s (648.40) acres.

All of section eighteen (18) containing six hundred and forty-seven and twenty one-hundredths (647.20) acres.

In township four (4) north of range eight (8) east of the sixth principal meridian.

All of section one (1) containing six hundred and thirty-five and sixty-nine one-hundredth- (635.69) acres.

The north half and southwest quarter of section five (5) containing four hundred and sixty-six and fifty-one one-hundredths (466.51) acres.

The north half and southwest quarter of section six (6) containing four hundred and thirty-five and seventy-one — hundredths (445.71) acres.

The west half of section seven (7) containing three hundred and fourteen and forty one-hundredths (314.40) acres.

The west half of section nine (9) containing three hundred and twenty (320) acres.

The southeast quarter of section nine (9) containing one hundred and sixty (160) acres.

The east half of section twelve (12) containing three hundred and twenty (320) acres.

All of section thirteen (13) containing six hundred and forty (640) acres.

The northeast quarter of section twenty (20) containing one hundred and sixty (160) acres.

The northwest quarter of section twenty-one (21) containing one hundred and sixty (160) acres.

117 The north half of section twenty-two (22) containing three hundred and twenty (320) acres.

All of section twenty-three (23) containing six hundred and forty (640) acres.

In township four (4) north of range seven (7) east of the sixth principal meridian.

The south half of section one (1) containing three hundred and twenty (320) acres.

All of section 14 containing six hundred and forty (640) acres.

All of section twenty-two (22) containing six hundred and forty (640) acres.

In township four (4) north of range six (6) east of the sixth principal meridian.

The north half and southeast quarter of section one (1) containing four hundred and sixty-six (466) acres.

The northeast quarter of section two (2) containing one hundred and fifty and forty-eight one-hundredths (150.48) acres.

The north half and southwest quarter of the southeast quarter of section two (2) containing one hundred and twenty (120) acres.

The northwest quarter of section three (3) containing one hundred and forty-nine — one-hundredths (149.99) acres.

The east half of section twelve (12) containing three hundred and twenty (320) acres.

In township three (3) north of range five (5) east of the sixth principal meridian.

The east half and southwest quarter and south half of northwest quarter of section four (4) containing five hundred and fifty-nine and fifty-nine one-hundredths (559.59) acres.

All of section twenty-two (22) containing six hundred and forty (640) acres.

All of section twenty-three (23) containing six hundred and forty (640) acres.

All of section twenty-six (26) containing six hundred and forty (640) acres.

All of section twenty-seven (27) containing six hundred and forty (640) acres.

All of section thirty-five (35) containing six hundred and forty (640) acres.

In township three (3) north of range four (4) east of the sixth principal meridian.

All of section eleven (11) containing six hundred and forty (640) acres.

All of section twelve (12) containing six hundred and forty (640) acres.

All of section fourteen (14) containing six hundred and forty (640) acres.

118 All of section twenty-three (23) containing six hundred and forty (640) acres.

All of section thirty (30) containing six hundred and twenty-two and sixty one-hundredths (622.60) acres.

All — section thirty-one (31) containing six hundred and thirty-nine and thirty-six one-hundredths (639.36) acres.

All of section thirty-two (32) containing six hundred and forty (640) acres.

The north half of section thirteen (13) containing three hundred and twenty (320) acres.

The east half and southwest quarter and south half of northwest quarter of section fifteen (15), containing five hundred and sixty (560) acres.

The south half and northeast quarter of section twenty-one (21) containing four hundred and eighty (480) acres.

The south half of section twenty-two (22) containing three hundred and twenty (320) acres.

In township one (1) north of range two (2) east of the sixth principal meridian.

The north half of section one (1) containing three hundred and eighteen (318) acres.

In township one (1) north of range three (3) east of the sixth principal meridian.

The south half of section six (6) containing three hundred and twenty-three and twelve one-hundredths (323.12) acres.

In township one (1) north of range one (1) west of the sixth principal meridian.

The south half and northwest quarter of section two (2) containing four hundred and eighty-four and ninety one-hundredths (484.90) acres.

All of section three (3) containing six hundred and forty-eight and fifty-six one-hundredths (648.56) acres.

All of section four (4) containing six hundred and forty-eight and seventy-six one-hundredths (648.76) acres.

All of section five (5) containing six hundred and forty-eight and twenty one-hundredths (648.20) acres.

The north half and southwest quarter of section six (6) containing four hundred and eighty-one and twenty-three one-hundredths (481.23) acres.

The west half of section seven (7) containing three hundred and twenty-six and sixty one-hundredths (326.60) acres.

The north half and southeast quarter of section eight (8) containing four hundred and eighty (480) acres.

The north half and north half of south half of section ten (10) containing four hundred and eighty (480) acres.

The north half of section eleven (11) containing three hundred and twenty (320) acres.

119 The west half of northwest quarter of section twelve (12) containing eughty (80) acres.

The south half and south half of northeast quarter of section fourteen (14) containing four hundred (400) acres.

The south half of section fifteen (15) containing three hundred and twenty (320) acres.

The south half and northwest quarter of section seventeen containing four hundred and eighty (480) acres.

All of section eighteen (18) containing six hundred and forty-three and ninety-six one-hundredths (643.96) acres.

All of section nineteen (19) containing six hundred and forty-two (642.85) acres.

The east half of section twenty-one (21) containing three hundred and twenty (320) acres.

All of section twenty-two (22) containing six hundred and forty (640) acres.

All of section twenty-three (23) containing six hundred and forty (640) acres.

The west half of section twenty-four (24) containing three hundred and twenty (320) acres.

All of section twenty-five (25) containing six hundred and forty (640) acres.

All of section twenty-six (26) containing six hundred and forty (640) acres.

All of section twenty-seven (27) containing six hundred and forty (640) acres.

The east half and east half of northwest quarter of section twenty-eight (28) containing four hundred (400) acres.

The southeast quarter and east half of southwest quarter of section twenty-nine (29) containing *containing* two hundred and forty (240) acres.

The north half and southwest quarter of the northeast quarter, and northwest quarter and north half of southwest quarter of section thirty (30) containing three hundred and sixty-one and sixteen-hundredths (316.16) acres.

The southeast quarter and east half of southwest quarter of section thirty-one (31) containing two hundred and forty (240) acres.

All of section thirty-two (32) containing six hundred and forty (640) acres.

The northeast quarter and east half of southeast quarter and west half of west half of section thirty-three (33) containing four hundred (400) acres.

All of section thirty-four (34) containing six hundred and forty (640) acres.

In township four (4) north of range one (1) west of the sixth principal meridian.

All of section one (1) containing six hundred and forty and seventy-five one-hundredths (640.75) acres

120 All of section two (2) containing six hundred and forty-three and eighty one-hundredths (643.80) acres.

All of section three (3) containing six hundred and forty-five and ninety-three one-hundredths (645.93) acres.

All of section twelve (12) containing six hundred and forty (640) acres.

In township six (6) north of range eight (8) east of the sixth principal meridian.

The north half of section three (3) containing three hundred and thirty-one (331) acres.

The west half and northeast quarter of section four (4) containing four hundred and ninety and forty one-hundredths (490.40) acres.

All of section five (5) containing six hundred and fifty-two (652) acres.

The west half and northeast *b* quarter of section six (6) containing three hundred and sixty-three one-hundredths (300.63) acres.

In township one (1) north of range eleven (11) west of the *six* sixth principal meridian.

All of section eight (8) containing five hundred and nineteen and eighty one-hundredths (519.80) acres.

All of section nine (9) containing five hundred and sixty-four and seventy one-hundredths (564.70) acres.

All of section ten 910) containing five hundred and sixty-six and seventy one-hundredths (566.70) acres.

All of section eleven (11) containing five hundred and eighty-three and ninety one-hundredths (583.90) acres.

All of section twelve (12) containing five hundred and eighty-seven and forty one-hundredths (587.40) acres.

All of section thirteen (13) containing six hundred and forty (640) acres.

The east half of section seventeen (17) containing three hundred and twenty (320) acres.

The east half of section twenty (20) containing three hundred and twenty (320) acres.

The east half of section twenty-three (23) containing three hundred and twenty (320) acres.

The west half of section twenty-four (24) containing three hundred and twenty (320) acres.

The west half of section twenty-five (25) containing three hundred and twenty (320) acres.

The east half of section twenty-six (26) containing three hundred and twenty (320) acres.

The northeast quarter of section twenty-nine (29) containing one hundred and sixty (160) acres.

In township one (1) north of range twelve (12) west of the sixth principal meridian.

121 All of section one (1) containing five hundred and thirty-one and sixty one-hundredths (531.60) acres.

All of section two (2) containing five hundred and eighty-four and seventeen one-hundredths (584.17) acres.

All of section three (3) containing five hundred and seventy-eight and eighty-two one hundredths (578.82) acres.

All of section four (4) containing five hundred and eighty-seven and fifty-four one-hundredths (587.54) acres.

The east half of section five (5) containing two hundred and ninety-one and twenty-two one-hundredths (291.22) acres.

All of section seven (7) containing five hundred and eighty-three and thirty one-hundredths (583.30) acres.

All of section eleven (11) containing six hundred and forty (640) acres.

The east half of section twenty-nine (29) containing three hundred and twenty (320) acres.

The east half of section thirty-two (32) containing three hundred and twenty (320) acres.

The west half of section thirty-three (33) containing three hundred and twenty (320) acres.

In township one (1) north of range thirteen (13) west of the sixth principal meridian.

All of section three (3) containing five hundred and fifty-two and forty-five one-hundredths (552.45) acres.

All of section four (4) containing six hundred and four and four one-hundredths (604.04) acres.

The north half of section five (5) containing two hundred and sixty-seven and thirty-five — (267.35) acres.

All of section six (6) containing five hundred and thirty-five and fifty-two one-hundredths (535.52) acres.

The east half of section eight (8) containing three hundred and twenty (320) acres.

The west half of section nine (9) containing three hundred and twenty (320) acres.

The east half of section twenty-one (21) containing three hundred and twenty (320) acres.

The northeast quarter of section twenty-eight (28) containing one hundred and sixty (160) acres.

Lots one (1), two (2), three (3) and four (4) in section eleven (11) containing two hundred and fifty-three and forty-five one-hundredths (253.45) acres.

Lots one (1), two (2), three (3), four (4), six (6), seven (7) and eight (8) in section twelve (12) containing two hundred and fifty-eight and ninety one-hundredths (258.90) acres.

In township one (1) north of range fourteen (14) west of the sixth principal meridian.

All of section one (1) containing five hundred and seventy-three (573.95) and ninety-five one-hundredths acres.

122 All of section two (2) containing five hundred and eighty-two and forty-two one-hundredths (582.42) acres.

All of section three (3) containing five hundred and seventy and seventy one-hundredths (570.70) acres.

All of section four (4) containing five hundred and sixty-eight and forty one-hundredths (578.40) acres.

All of section five (5) containing five hundred and forty-one and thirty-six one-hundredths (541.36) acres.

All of section six (6) containing five hundred and forty-nine and ninety-seven one-hundredths (549.97) acres.

The southeast quarter of section seven (7) containing one hundred and sixty (160) acres.

The southwest quarter of section eight (8) containing one hundred and sixty (160) acres.

The west half of section eighteen (18) containing three hundred and twenty-two and sixteen one-hundredths (322.16) acres.

The northwest quarter of section nineteen (19) containing one hundred and — seventy-seven one-hundredths (161.77) acres.

In township two (2) north of range four (4) west of the sixth principal meridian.

All of section six (6) containing six hundred and eight and twenty-seven one-hundredths (608.27) acres.

All of section seven (7) containing six hundred and thirteen and sixty one-hundredths (613.60) acres.

The southwest quarter and southwest quarter of northwest quarter of section eight (8) containing two hundred (200) acres.

All of section thirteen (13) containing six hundred and forty (640) acres.

All of section fourteen (14) containing six hundred and forty (640) acres.

All of section fifteen (15) containing six hundred and forty (640) acres.

All of section seventeen (17) containing six hundred and forty (640) acres.

All of section eighteen (18) containing six hundred and sixteen and eighty one-hundredths (616.80) acres.

All of section nineteen (19) containing six hundred and nineteen and ninety-two one-hundredths (619.92) acres.

All of section twenty (20) containing six hundred and forty (640) acres.

All of section twenty-one (21) containing six hundred and forty (640) acres.

All of section twenty-two (22) containing six hundred and forty (640) acres.

All of section twenty-three (23) containing six hundred and forty (640) acres.

123 All of section twenty-four (24) containing six hundred and forty (640) acres.

All of section twenty-five (25) containing six hundred and forty (640) acres.

All of section twenty-six (26) containing six hundred and forty (640) acres.

All of section twenty-seven (27) containing six hundred and forty (640) acres.

All of section twenty-eight (28) containing six hundred and forty (640) acres.

All of section twenty-nine (29) containing six hundred and forty (640) acres.

All of section thirty (30) containing six hundred and twenty-two (22) and ninety-two one-hundredths (622.92) acres.

All of section thirty-one (31) containing six hundred and twenty-four and twenty one-hundredths (624.20) acres.

All of section thirty-two (32) containing six hundred and forty (640) acres.

All of section thirty-three (33) containing six hundred and forty (640) acres.

All of section thirty-four (34) containing six hundred and forty (640) acres.

All of section thirty-five (35) containing six hundred and forty (640) acres.

In township 1 north of range fifteen (15) west of the sixth principal meridian:

All of section one (1) containing five hundred and ninety and ninety-nine and forty-three one-hundredths (999.43) acres.

All of section (7) containing five hundred ninety-seven and sixty-eight one-hundredths (597.68) acres.

The west half of section twenty-two (22) containing three hundred and twenty (320) acres.

The west half of section twenty-seven (27) containing three hundred and twenty (320) acres.

Lots six (6), seven (7), eight (8), nine (9) and ten (10) in section two (2) containing three hundred and ninety-two and forty-five one-hundredths (392.45) acres.

In township one (1) north of range sixteen (16) west of the sixth principal meridian:

The south half of section six (6) containing two hundred and seventy-nine and ninety-seven one-hundredths (279.97) acres.

All of section seven (7) containing six hundred and twenty-six and sixty-four one-hundredths (626.64) acres.

124 All of section eleven (11) containing five hundred and eighty-seven and fifty-five one-hundredths (587.55) acres.

All of section twelve (12) containing five hundred and ninety-eight and forty-five one-hundredths (598.45) acres.

The north half of section fifteen (15) two hundred and seventy-three and ninety-five one-hundredths (273.95) acres.

The west half of section nineteen (19) containing three hundred and twenty-one and twenty-eight one-hundredths (321.28) acres.

The west half of section thirty (30) containing three hundred and twenty-two and forty one-hundredths (323.40) acres.

The north half and southeast quarter of section thirty-one (31) containing four hundred and eighty-one and fifty one-hundredths (481.50) acres.

In township twenty (20) north of range two (2) east of the principal meridian:

The south half of section four (4) containing three hundred and twenty acres (320).

All of section five (5) containing six hundred and fifty-one and fifty-nine one-hundredths (651.59) acres.

In township twenty (20) north of range three east of the sixth principal meridian.

The north half of section five (5) containing three hundred *an* and forty-six and sixty-two one-hundredths (346.62) acres.

The north half of section six (6) containing three hundred and forty and eighty-five one-hundredths (340.85) acres.

In township twenty (20) north of range one (1) east of the sixth principal meridian.

All of section one (1) containing six hundred and thirty-six and forty-three one-hundredths (636.43) acres.

All of section 2 containing six hundred and thirty-four and forty-one one-hundredths (634.41) acres.

The south half of section three (3) containing three hundred and twenty (320) acres.

The south half of section four (4) containing three hundred and twenty (320) acres.

The north half of section eight (8) containing three hundred and twenty (320) acres.

The north half of section nine (9) containing three hundred and twenty (320) acres.

The north half of northeast quarter and north half of northwest

quarter of section twelve (12) containing one hundred and sixty (160) acres.

In township twenty (20) north of range one (1) west of the sixth principal meridian.

All of section one (1) containing six hundred and thirty-six and eighty-eight one-hundredths (636.88) acres.

All of section two (2) containing six hundred and thirty-four and sixty-eight one-hundredths (634.68) acres.

All of section five (5) containing six hundred and twenty-six and sixty one-hundredths (626.60) acres.

All of section seven (7) containing six hundred and forty-one and twenty one-hundredths (641.20) acres.

In township twenty (20) north of range two (2) west of the sixth principal meridian.

All of section two (2) containing six hundred and twelve and seventeen one-hundredths (612.17) acres.

All of section ten (10) containing six hundred and forty (640) acres.

All of section twelve (12) containing six hundred and forty (640) acres.

In township twenty-one (21) north of range one (1) west of the sixth principal meridian.

All of section nine (9) containing six hundred and forty (640) acres.

All of section thirteen (13) containing six hundred and forty (640) acres.

All of section twenty-one (21) containing six hundred and forty (640) acres.

All of section twenty-four (24) containing six hundred and forty (640) acres.

All of section twenty-five (25) containing six hundred and forty (640) acres.

In township twenty-two (22) north of range two (2) west of the sixth principal meridian.

All of section twenty-two (22) containing six hundred and forty (640) acres.

In township twenty-one (21) north of range one (1) west of the sixth principal meridian.

All of section eleven (11) containing six hundred and forty (640) acres.

All of section fifteen (15) containing six hundred and forty (640) acres.

All of section seventeen (17) containing six hundred and forty (640) acres.

All of section twenty-seven (27) containing six hundred and forty (640) acres.

All of section twenty-nine (29) containing six hundred and forty (640) acres.

All of section thirty-one (31) containing six hundred and thirty-nine and forty one-hundredths (639.40) acres.

All of section thirty-three (33) containing six hundred and forty (640) acres.

In township twenty-one (21) north of range two (2) west of the sixth principal meridian.

All of section eighteen (18) containing six hundred and forty-five and ninety-two one-hundredths (645.92) acres.

126 All of section twenty (20) containing six hundred and forty- (640) acres.

The south half and northeast quarter of section thirty-two (32) containing four hundred and eighty (480) acres.

In township twenty (20) north of range two (2) west of the sixth principal meridian.

All of section eight (8) containing six hundred and forty (640) acres.

Amounting in the aggregate to ninety-nine thousand nine hundred and seventy-three and eight one-hundredths (99—.08) according to the Government survey.

Together with all the rights, privileges and appurtenances thereunto belonging, or pertaining thereto.

And the said Midland Pacific Railway Company the said party of the first part do covenant and agree that at the delivery hereof they are the lawful owners of the premises above granted, seized of perfect title thereto, clear of all incumbrances whatever, and they, the party of the first part, will warrant and defend the aforesaid premises unto the said party of the second part, his heirs and assigns forever against all claim and demand whatever, as well in law as in equity.

In witness whereof the said Midland Pacific Railway Company, the party of the first part, has caused these presents to be [SEAL.] executed and signed by the president of their company in its behalf and have caused the corporate seal of the company to be hereto affixed the day and year first above written.

MIDLAND PACIFIC RAILWAY COMPANY,
By BENJAMIN E. SMITH, *President.*

Attest: JOHN H. WHEELER, *Secretary.*

Executed in presence of—
E. C. SMITH.
G. MOODIE.

Attached to said deed are twelve $10.00 internal-revenue stamps, one $2.50 internal-revenue stamp and one $1.00 internal-revenue stamp.

Indorsed on said deed are the following certificates, to wit:

STATE OF OHIO, }
Franklin County. }

127 Before me the undersigned a duly commissioned and qualified notary public of the State of Ohio, in and for said Franklin county personally appeared the within-named Benjamin E. Smith,

president of the Midland Pacific Railway Company, the party of the first part in the within indenture and known to me as such president, acknowledged the within indenture to be his official and voluntary act and deed and the voluntary act and deed of said railway company.

In witness whereof I have hereto subscribed my name [SEAL.] and affixed my official seal this 6th day of November, A. D. 1871.

T. J. JENNEY,
Notary Public in and for Franklin County, O.

STATE OF NEBRASKA, }
Gage County. }

I, Wm. D. Cox, county clerk and *ex officio* recorder within and for said county and State aforesaid, do hereby certify the foregoing instrument was filed for record on this 15th day of November, A. D. 187–, at 12 o'clock m., and duly recorded in Book — of Deeds on pages from 380 to 391 inclusive.

Witness my hand and official seal the date above written.

[SEAL.] WM. D. COX,
County Clerk.

STATE OF NEBRASKA, } ss:
Webster County, }

Entered on numerical index and filed for record June 1st, 1880, at 9 o'clock a. m. and recorded in Book "D" of Deeds on pages 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376 & 377.

J. A. TULLEYS,
County Clerk.

STATE OF NEBRASKA, } ss:
Franklin County, }

Filed for record and entered in numerican index this 4th day of March, A. D. 1881, at 4 o'clock p. m. and recorded in Book 5 of Deeds on pages 169 to 177 inclusive.

M. F. MAHIN,
County Clerk.

128 THE STATE OF NEBRASKA, }
Thayer County. }

Entered on numerical index and filed for record in the clerk'-office of said county the 21st day of May, 1885, at 11 o'clock a. m. and recorded in Book "O" of Deeds on pages 139 to 150 inclusive.

A. F. CLEMONS,
County Clerk,
By FRANK LEADOM, *Deputy.*

Copy.

EXHIBIT "G."

This indenture, made this tenth day of December, A. D. 1873, by and between Joel N. Converse and Ann E. Converse, his wife, of Union City, Randolph county, State of Indiana, of the first part, and David S. Gray, of Columbus, in the State of Ohio, of the second part,

Witnesseth:

That whereas, the said Joel N. Converse and his associates as partners constituting the firm of J. N. Converse & Co., become entitled to divers and large tracts of land, lying and being in the State of Nebraska, and are the equitable owners thereof.

And whereas, the legal title to said lands, is in the said Joel N. Converse, by conveyance thereunto for that purpose made, but who holds said title in trust for himself and his said associates:

And whereas, a large majority of the individuals constituting the said firm of J. N. Converse & Co. have in writing requested and directed the said J. N. Converse to convey the said lands to the said David S. Gray, in trust for the uses and purposes in said writing named, and hereinafter specifically set forth.

Now, therefore, in accordance with said directions, and in consideration of the sum of one dollar, to us in hand paid, the receipt whereof is hereby acknowledged, we, the said Joel N. Converse and Ann E. Converse, his wife, do by these presents give, grant, sell, transfer, convey, confirm and assign unto the said party of the second part, and to his heirs, successors, and assigns forever, the following-described real estate, situate in the State of Nebraska, and more particularly described as follows, to wit:

129 In the county Saline.

In township five (5) north, range three (3) east of sixth principal meridian.

All of section fourteen (14), containing six hundred and forty (640) acres.

To have and to hold the following lands and lots with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining unto him, the said David S. Gray, party of the second part, and to his successor or successors and to his or their heirs or assigns forever.

In trust nevertheless, and for the sole use and benefit of the said J. N. Converse and Company, and upon the terms and conditions following, to wit:

First. That he will receive this conveyance and an assignment of the notes and contracts given for the purchase of lands heretofore sold, and hold and dispose of the same for the uses and purposes hereinafter named.

Second. That as such trustee, and for the same uses and purposes, he is hereby authorized, and empowered, and directed to receive

from whatsoever source the same may come like conveyance to this for any and all lands in the State of Nebraska to which the said J. N. Converse and Co. is now or may hereafter become entitled.

Third. That said trustee is authorized and directed to carry out and perfect any and all contracts made by the said J. N. Converse for the sale of any of the lands and lots of J. N. Converse & Co. and to collect, receive, and apply the proceeds of said contracts as hereinafter specified, and when paid to execute and deliver to the parties entitled thereto proper deeds and conveyances therefor.

Fourth. The said trustee shall cause the notes and contents so to be received from J. N. Converse to be accurately inventoried, with the amounts thereof, and the time or times when due and payable to be distinctly stated.

Fifth. That he shall cause the lands above described and all other lands, as soon as conveyances thereafter are obtained, to be appraised by two or more disinterested parties, and a record thereof, with the description of each parcel of land and the appraised value thereof, to be made in a convenient form and preserved in his office.

Sixth. That he shall prepare and issue land certificates in such amounts, and to such persons or corporations, and for such
130 uses and purposes as Benjamin E. Smith, William G. Deshler, and Benjamin S. Brown, or any two of them, may from time to time direct, provided that such certificates shall never exceed in the aggregate the appraised value of the lands and land notes and contracts on hand and undisposed of at the time of their issue.

Seventh. That for the period of two years after the issue of such certificates the same shall be received at their par value in exchange or payment for land at the appraised value thereof or in payment of outstanding land notes or contracts, with the accrued interest thereon.

Eighth. That said land certificates shall bear upon their face the provision that for said term of two years they will be receivable at par in payment for land or land notes and contracts at the appraised or registered value thereof, and if not so applied they will be entitled to their *pro rata* dividend of the proceeds of the sale of such lands and collections of notes and contracts.

Ninth. That the said trustee during the said term of two years shall proceed with diligence in *in* the sale of said lands at prices not below the appraised value thereof, making contracts and conveyances, and receiving payment therefor, and applying the proceeds thereof and of the outstanding notes and contracts to the payment of the taxes on said land, the expenses of this trust, and the balance to distribute semi-annually and *pro rata* among the holders of such land certificates as may then be outstanding, and when paid in full to cause the same to be canceled.

Tenth. That said trustee may and hereby is authorized to lay out and establish stations and towns on any of the lands held or asquired by him lying on the line of the Midland Pacific railway or any of its branches, now or hereafter constructed, deemed necessary and requisite for the interests and business of said road, and to convey to the Midland Pacific Railway Company so much of said lands and

lots as may be deemed necessary for the purposes of depot water stations, stock yards, etc., on such terms and for such considerations as he and the said Benjamin E. Smith, William G. Deshler and Benjamin S. Brown, or any two of them, may deem just and equitable.

Eleventh. That after the expiration of said term of two years from the date hereof the said trustee, under the direction of the said Benjamin E. Smith, William G. Deshler and Benjamin S. Brown, shall make a public sale of all the lands and lots then be-
131 longing to the said J. N. Converse & Co., and held by said trustee, upon such terms and conditions as in the judgment of said trustee and said Smith, Deshler and Brown will produce the largest results, and out of the proceeds thereof pay off and discharge all the land certificates which may then be outstanding and unpaid, and the remainder thereof to pay over to said J. N. Converse & Co. in the full discharge of his said trust.

Twelfth. That said Gray, as trustee, shall be responsible only for gross negligence, or wilful default, and that he shall not be bound to do any act, touching the execution of this trust, except at his own option, which may involve him in personal expense, or liability, unless duly and satisfactorily indemnified against the same by J. N. Converse & Co.

Thirteenth. In case of the death, resignation or inability to act, of the said Gray as trustee, the said J. N. Converse & Co. may appoint a successor and such appointment shall invest the trustee so appointed, with all the interest, estate, power and authority in the premises, and subject him to the same obligations, hereby given to said Gray, as trustee.

Fourteenth. Said trustee shall have power to employ and appoint, from time to time, such agents and attorneys as he may deem necessary and requisite for the faithful discharge and fulfillment of his trust, and may do and perform any other act or thing not herein specified necessary to be done for the speedy closing and fulfillments of this trust.

In witness whereof, the said parties have hereunto set their hands and seals the day and year above written.

JOEL N. CONVERSE. [SEAL.]
ANN E. CONVERSE. [SEAL.]
DAVID S. GRAY. [SEAL.]

Signed, sealed, and delivered in presence of us—
R. SMITH.
T. J. JANNEY.

THE STATE OF OHIO, }
Franklin County. }

Before me, a duly commissioned and qualified notary public of the State of Ohio, in and for the county of Franklin, personally appeared the above-named Joel N. Converse and Ann E. Converse, his wife, and David S. Gray, and each acknowledged the signing and sealing of the foregoing indenture to be their voluntary act
132 and deed, and the said Ann E. Converse, being at the same

time examined by me apart and separate from her husband, and the contents of said instrument made known to her by me, she then declared that she did voluntarily sign, seal, and acknowledged the same, and that she is still satisfied therewith.

In witness whereof, I have hereto subscribed my name and affixed my official seal this tenth day of December, A. D. 1873.

J. T. JANNEY,
Notary Public in and for Franklin County, Ohio.

Attached and indorsed on the back of said deed are the following certificates of filing and recording, to wit:

Entered numerical index Sept. 5th, 1874.

WM. D. COX,
County Clerk.

STATE OF NEBRASKA, } ss :
Gage County, }

Filed for record Sept. 5th, 1874, at 6 o'clock p. m. and recorded in Mortgage Record "C," pages 342 to 364, inclisive.

WM. D. COX,
County Clerk.

Examined.

STATE OF NEBRASKA, } ss :
County of Webster, }

Entered on the numerical index and filed for record Oct. 3, 1874, at 6.20 o'clock p. m. and recorded in Book "A" of Deeds, pages 240 to 258, inclusive.

J. A. TULLEYS,
County Clerk.

STATE OF NEBRASKA, } ss :
Saline County, }

Entered on numerical index and filed for record at 8 o'clock a. m. October 19th, A. D. 1874, and recorded in Book 2 of Mortgages, pages 382 to 396, inclusive.

S. A. GRIMES,
County Clerk.

133 STATE OF NEBRASKA, } ss :
County of Platte, }

Received for record the 5th day of April, 1875, at 8 o'clock a. m. and recorded in Book G of Deeds on pages 49 to 70 inclusive.

E. G. BECHER, *Co. Clerk.*

STATE OF NEBRASKA, } ss :
Nuckolls County, }

This indenture filed for record on the 28th day of April, A. D. 1875, at 11.30 a. m. and recorded in Book A of Deeds, pages 557 to 800 inclusive.

JAS. GARBER, *Co. Clerk.*

Deed of trust to Joel W. Converse & wife to David S. Gray.

STATE OF NEBRASKA, } ss:
County of Otoe, }

Filed for record June 27th, 1874, at 11.25 o'c. a. m. Recorded in Book "Z" of Deeds, pages 229 to 247.

D. MACCUALY,
County Clerk,
By A. WADDINGTON, *Deputy.*

STATE OF NEBRASKA, } ss:
County of Thayer, }

Entered on the numerical index and filed for record July 6th, 1874, at 7 o'clock a. m. Recorded in Book "C" of Deeds, on pages 174 to 192.

M. M. HOUSE,
[SEAL.] By F. J. HENDERSHOT,
Deputy Clerk.

Filed April 20, A. D. 1874, at 9 o'clock a. m. Recorded in Book No. 1 of Deeds, page- 76 to 82.

JOSEPH A. PERRY,
County Clerk of Franklin County, Nebr.

Filed for record and recorded on the records of Colfax county, this 24th day of Mar., at 9 a. m., 1875, in Book D of Deeds, p. 138.

J. S. CLARKE,
County Clerk.

134 STATE OF NEBRASKA, } ss:
County of Jefferson, }

Filed for record August 27th, 1874, at 9.08 -'clock and 30 minutes a. m. and recorded in Book H of Deeds, on pages 41 to 63 inclusive.

DAVID C. WORK,
County Clerk of Jefferson County, Nebr.

J. S. Converse & wife to David S. Gray. Trust deed.

Entered on numerical index & filed for record January 10, 1874, at 9.30 *p.* m. Recorded in Book N of Deeds, page- 303, 327.

R. O. PHILLIPS, *Clk,*
By J. P. NEBORD, *Deputy.*

Received for record Nov. 25th, 1874.

EXHIBIT "H."

(Copy.)

Know all men by these presents: that we, David S. Gray, trustee for J. N. Converse & Co., and Eugenia D. Gray, his wife, of the city of Columbus, in the State of Ohio, in consideration of seven thousand six hundred and eighty dollars paid by Jacob Reinhard and Frederick Fieser, have bargained and sold, and do hereby sell, grant and convey, unto the said Jacob Reinhard and Frederick Fieser,

their heirs and assigns, forever, the following real estate, situate in Saline county, State of Nebraska, to wit:

All of section fourteen (14), town. five (5), range three (3) east of the sixth principal meridian, and containing six hundred and forty (640) acres, according to Government survey.

To have and to hold said premises, with the appurtenances unto the sa-d Jacob Reinhard and Frederick Fieser, their heirs and assigns forever.

And the said David S. Gray, trustee for J. N. Converse & Co., doth hereby covenant with said Jacob Reinhard and Frederick Fieser, their heirs and assigns, that he has not made or suffered any incumbrance on the hereby-granted premises since he was appointed trustee for J. N. Converse & Co., and that he has in all respects acted in making this conveyance in pursuance of the authority granted to him in and by the deeds of trust conveying said premises to him, dated December 10th, 1873, and duly recorded in
135 said county, reference to which is hereby had, and that he will forever warrant and defend the same from all incumbrances whatsoever, occasioned or suffered by him, or by any person claiming under him, or by his or their act or procurement.

In witness whereof the said David S. Gray, trustee as aforesaid, and Eugenia D. Gray, his wife (who hereby relinquishes all rights of dower), have hereunto set their hands and seals this 11th day of November, A. D. 1878.

DAVID S. GRAY, *Trustee.* [SEAL.]
EUGENIA D. GRAY. [SEAL.]

Signed, sealed, and acknowledged in presence of—

CHAS. C. HIGGINS.
R. O. SMITH.

THE STATE OF OHIO, } ss:
Franklin County, }

Before me, the undersigned, a notary public, of the county and State aforesaid, duly commissioned and qualified, personally appeared David S. Gray, trustee for J. N. Converse & Co., and Eugenia D. Gray, his wife, the grantors named in the above instrument, and acknowledged the signing and sealing of said instrument to be their voluntary act and deed; and the said Eugenia D. Gray, having been by me examined separate and apart from her said husband, and the contents of said instrument then by me made known to her, did, upon such separate examinations, declare that she did voluntarily sign, seal, and acknowledged the same, and was then still satisfied therewith.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my notarial seal this 11th day of November, A. D. 1878.

R. O. SMITH,
Notary Public in and for Franklin County, Ohio.

On the back of said deed appear indorsements in words and figures following, to wit: Saline county. Warranty deed. B. S. Gray and wife to Jacob Reinhardt & Fred'k Fieser, Columbus, O. Dated November 11th, 1878.

136 STATE OF NEBRASKA, } ss:
County of Saline, }

Entered on numeri-al index and filed for record April 21, 1879, at 5 o'clock — minutes p. m., and recorded in the office of the clerk of said county, in Book 12 of Deeds, on page 464.

C. H. SLOCUM,
County Clerk.

Fee p'd. Ret. to N. B. Kendall, Lincoln. Exhibit H.

EXHIBIT "I."

The United States of America to all — whom these presents shall come, Greeting:

Whereas by the act of Congress approved July 2nd, 1864, to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes, authority is given to the Burlington & Missouri River Railroad Company, a corporation existing under the laws of the State of Iowa, to extent its road through the Territory of Nebraska, from the points where it strikes the Missouri river south of the mouth of the Platte river, to some point not further west than the 100th meridian of west longitude, and provision is made for granting to the said Burlington & Missouri River Railroad Company every alternate section of public land designated by odd numbers to the amount of ten alternate sections per mile on each side of said road on the line thereof and not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed;

And whereas, by joint resolution approved April 10th, 1869, the said Burlington & Missouri River Railroad Company is authorized to assign and convey to a railroad company to be organized under the laws of the State of Nebraska, all the rights, powers and privileges granted and conferred by said act of July 2nd, 1864, and subject to all the conditions or requirements therein contained and a copy of the articles of incorporation authorized by said resolution and bearing date May 12th, 1889, has been filed in the department;

And whereas, by the act approved May 6th, 1870, the said Burlington & Missouri River Railroad Company or its assigns in the State of Nebraska may so far change the location of that
137 portion of its line that lies west of the city of Lincoln in said State, as shown by the map thereof now on file in the General Land Office, so as to secure a better and more practicable route and to connect with the Union Pacific railroad at or near the Fort Kear-

ney reservation, which map of the amended line has been duly filed in this office.

And whereas, it is indicated by letters of the Secretary of the Interior to the Commissioner of the General Land Office, dated October 13th, Nov. 15th, and Dec. 15th, 1871, that the commissioners appointed by the President under the provisions of the 20th section of said act of Congress approved, July 2nd, 1864, have reported to him that seven sections of twenty miles each of said railroad have been completed and equipped in the manner prescribed by said act, and the same accepted by the President.

And whereas, certain tracts have been selected under the acts aforesaid, by William T. Steiger, the agent of the Burlington & Missouri River Railroad Company, as shown by the original lists of selections dated Dec. 8th, 1871, April 1st and 17th, 1872, certified under dates April 19th and 30th and May 6th, 1872, by the register and receiver at Lincoln, Nebraska, and his lists of selections dated January 12th, 1872, certified by the register and receiver at Beatrice, Nebraska, April 20th, 1872; the said tracts being within twenty miles of the line of said road, and described as follows, to wit: North of the base line, and east of the sixth principal meridian, township 5, range 3.

* * * * * * *

All of section 13, containing 640 acres.
All of section 15, containing 640 acres.

* * * * * * *

Now, know ye, that the United States of America, in consideration of the premises, and pursuant to the said acts of Congress, have given and granted, and by these presents give and grant unto the said Burlington & Missouri River Railroad Company in Nebraska, and to its assigns, the tracts of lands selected as aforesaid and described in the foregoing, yet excluding and excepting from the transfer by these presents, all mineral lands should any such be found to exist in the tracts described in the foregoing; but this exception and exclusion according to the terms of the statutes, shall not be construed to include coal and iron land.

To have and to hold the said tracts, with the appurtenances unto the said Burlington & Missouri River Railroad Company
138 of Nebraska, and to its assigns forever with the exclusion and exception as aforesaid.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

United States General Land Office Seal.

Given under my hand, at the city of Washington, this 15th day of June, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

By the President:

U. S. GRANT,
By J. PARISH, *Secretary.*
C. B. BOYNTON,
Recorder of the General Land Office.

"F." DEPARTMENT OF THE INTERIOR, W. P. J.
GENERAL LAND OFFICE, W. C. E.
WASHINGTON, D. C., *Sept. 20th*, 1889.

I, W. M. Stone, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter of March 1st, 1867, addressed to the local officers at Brownville, Nebr., is a true and literal exemplification from the record of same on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

W. N. STONE,
Acting Commissioner of the General Land Office.

139 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 1, 1867.

Register and receiver, Brownville, Neb.

GENTLEMEN: The Secretary of the Interior having under date of Dec. 17, 1866, and Jan'y 25, 1867, directed a restoration of lands withdrawn from the Burlington & Missouri River railroad outside of twenty miles from the line of said road, you are hereby instructed to restore the odd sections thus withdrawn in your district to the condition they were prior to the date of withdrawal.

The lands to be restored are the odd sections which lie north of the line dividing townships four and five and south of the twenty-miles limit of said road, as shown on the diagram herewith.

The odd sections within the twenty-miles limit are still reserved, and the even sections within that limit are increased to $2.50 per acre and hereafter will only be subject to pre-emption and homestead at that price, except where inceptial rights under the pre-emption law may have accrued prior to the receipt of these instructions by you.

The register will at once proceed to lay down in pencil on the township plats the twenty-mile limit of this road and make the proper notes thereon, showing the odd sections to be reserved and the even sections to be $2.50 per acre.

The conflicting limits of this road and the Union Pacific are shown upon the diagram. When the railroad companies make their selections the lands in conflict between the two limits should be selected jointly for both roads.

The odd sections in the following townships and ranges which were withheld from the restoration of Nov. 14, 1866, of lands along the Republican fork because they were required for this road, but which are now outside of the 20-mile limit of this road, are subject to restoration, viz.:

North half of town. 2, ranges 15 to 20 W., inclusive; north half of town. 3, range 12 W., and towns. 3 of ranges 13 to 24 W., inclusive; north half of town. 4 of range 10, and town. 4 of ranges 11 to 24,

inclusive, and will be restored accordingly with the lands before mentioned.

140 You will give notice by public advertisement that on a certain day, not less than 30 days from the date of notice, the lands thus withdrawn will be restored—these which had been offered at public sale to private entry, and when the same had not been offered, to settlement and entry under the pre-emption and homestead laws.

This notice will be published once a week for the time specified in a newspaper having the largest circulation in your district.

The notice will only give the townships and ranges within which the odd sections are to be restored, and for information as to particular tracts to be restored you will refer parties to your office.

If two or more parties apply on the last day—the day of restoration—for the same tract, it will be put up at auction and sold to the highest bidder. If not paid for on that day, it will be put on the next day, and if not then purchased, it will thereafter be subject to private entry.

You will transmit a list of the lands restored to "private entry," also a list of the lands restored to "pre-emption & homestead," with a joint report; also transmit copies of the papers containing the advertisements, taking care in the first instance to make out and have ready for public inspection in your office the list of the lands thus to be restored, each class of course to be in a separate list.

It is important that you make out each of the said lists in duplicate as preliminary to restoration and that you should at once send to this office duplicates of the originals you retain in your office as the basis of operations under these instructions.

The receiver as acting disbursing agent will pay for the advertising at the rate of 75 cts. for first insertion and 37½ cents for each subsequent one—"brevier ems." Reference will be made to the date of this on publisher's receipt of payment, to which will be attached a copy of advertisement; acknowledge receipt.

Very respectfully, your ob't se'v't,

JAS. S. WILSON,
Commissioner.

(Here follows map marked page 141.)

142 & 143 EXHIBIT "K."

List No. 1.

Duplicate.

The Burlington and Mo. River railroad. Selections under act of 2d July, 1864, within Mr. Secretary Browning's 20-ms. limits, in the Beatrice district, Nebraska.

Washington, D. C., December 8th, 1871.

WASHINGTON, D. C., *December 8th*, 1871.

The Burlington and Missouri River Railroad Company in Nebraska, under and by virtue of the act of Congress entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July first, eighteen hundred and sixty-two, approved July 2d, 1864 (13 Stat., p. 356), and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections on account of the public lands claimed by the said company as enuring to it and to which it is entitled under and by virtue of the grants and provisions of the said act of Congress and the location of the line of route of the road of said company; being for the first seven sections of twenty miles each (or 140 miles) of its completed road, commencing at Plattsmouth and ending at the meridian line which divides ranges seven (7) and eight (8) west of the 6th principal meridian, the selections being particularly described as follows, to wit:

144 The Burlington and Missouri River Railroad in Nebraska.

North of base line and east of the 6th principal meridian, Nebraska.
Selections under act of 2nd July, 1864.

Beatrice district. *Railroad List.*

Within Mr. Secretary Browning's limits of 20 miles.

Parts of section.	Section.	Township.	Range.	Acres.
Lands situated south of the original line of location.				
All	1	6	1 E.	639.44
All	3	6	1	634.64
All	5	6	1	634.64
All	7	6	1	642.32
All	9	6	1	640
All	11	6	1	640
All	13	6	1	640
All	15	6	1	640
All	17	6	1	640
All	19	6	1	638.24
All	21	6	1	640
All	23	6	1	640
All	25	6	1	640
All	27	6	1	640
All	35	6	1	640
E. ½ sec. N. W. ¼ & S. E. ¼ S. W.	1	5	2	562.44
All	3	5	2	641.40
All	5	5	2	644.08
All	11	5	2	640
All	1	6	2	646.80
All	3	6	2	645.04
All	5	6	2	641.84
All	7	6	2	633.44
All	9	6	2	640
All	11	6	2	640
All	13	6	2	640
All	15	6	2	640
All	17	6	2	640
All	19	6	2	633.00
All	21	6	2	640
All	23	6	2	640
All	25	6	2	640
S. ½ sec. & N. W. ¼	27	6	2	480
All	29	6	2	640
Amount carried forward				21,517.32

145 North of base line and east of the 6th principal meridian, Nebraska. Selections under act of 2nd July, 1864.

Beatrice district. South of road.

Railroad List.

Parts of section.	Section.	Township.	Range.	Acres.
Amount brought forward				21,517.32
All	31	6	2 E.	636.16
All	33	6	2	640
N. E. ¼ W. ½ S. W. ¼ & E. ½ S. E	35	6	2	320
All	1	5	3	639.32
All	3	5	3	640.40
All	5	5	3	643.44
All	7	5	3	645.20
All	9	5	3	640
All	11	5	3	640
All	13	5	3	640
All	15	5	3	640
All	1	6	3	640.40
All	3	6	3	641.40
All	5	6	3	649.00
All	7	6	3	637.08
All	9	6	3	640
All	11	6	3	640
All	13	6	3	640
All	15	6	3	640
All	15	6	3	640
All	17	6	3	640
All	19	6	3	639.08
All	21	6	3	640
All	23	6	3	640
All	25	6	3	640
All	27	6	3	640
All	29	6	3	640
All	31	6	3	640.24
All	33	6	3	640
All	35	6	3	640
E. ½ sec. E. ½ N. W., N. W., N. W., N. E. S. W.	1	5	4	481.84
All	3	5	4	640
All	5	5	4	640
All	7	5	4	637.84
S. W. ¼, E. ½ N. E. & W. ½ N. W	9	5	4	320
All	11	5	4	640
Amount carried forward				43,128.72

146 North of base line and east of the 6th principal meridian, Nebraska. Selections under act of 2nd July, 1864.

Beatrice district. South of road.

Railroad List.

Parts of section.	Section.	Township.	Range.	Acres.
Amount brought forward				43,128.72
N. ½ sec. N. ½ S. E. & N. E. S. W.	17	5	4 E.	440
All	1	6	4	641.80
W. ½ sec. S. E. ¼ & S. ½ N. E.	3	6	4	561.45
All	5	6	4	639.88
W. ½ sec.	7	6	4	342.00
All	9	6	4	640
E. ½ sec. E. ½ N. W. & E. ½ S. W.	11	6	4	480
All	13	6	4	640
All	15	6	4	640
All	17	6	4	640
W. ½ sec. & S. ½ S. E.	19	6	4	409.80
All	21	6	4	640
S. ½ sec. W. ½ N. W., E. ½ N. E. & S. W. N. E.	23	6	4	520
All	25	6	4	640
S. W. ¼, N. W. N. W., N. ½ N. E. & S. W. S. E.	27	6	4	320
W. ½ sec. & N. E. ¼	29	6	4	480
All	31	6	4	641.40
E. ½ sec. & N. W. ¼	33	6	4	480
All	35	6	4	640
All	1	5	5	637.40
All	3	5	5	633.80
E. ½ sec. N. W. ¼ & W. ½ S. W.	5	5	5	552.40
All	7	5	5	660.32
All	1	6	5	636.20
All	3	6	5	639.60
All	5	6	5	642.28
All	7	6	5	662.88
All	9	6	5	640
All	11	6	5	640
All	13	6	5	640
All	15	6	5	640
All	17	6	5	640
All	19	6	5	656.32
All	21	6	5	640
S. ½ sec. S. W. ¼, E. ½ N. W. & S. W. N. W.	23	6	5	600
Amount carried forward				63,726.25

147 North of base line and east of the 6th principal meridian, Nebraska. Selections under act of 2nd July, 1864.

Beatrice district. South of road.

Railroad List.

Parts of section.	Section.	Township.	Range.	Acres.
Amount brought forward				63,726.25
All	25	6	5 E.	640
S. ½ sec. E. ½ N. E., S. W. N. E. & N. W. N. W	27	6	5	480
All	29	6	5	640
All	31	6	5	656.24
All	33	6	5	640
All	35	6	5	640
All	1	6	6	633.20
All	3	6	6	630.88
All	5	6	6	632.52
All	7	6	6	637.88
All	9	6	6	640
All	11	6	6	640
All	13	6	6	640
All	15	6	6	640
All	17	6	6	640
All	19	6	6	636.36
All	21	6	6	640
All	23	6	6	640
All	29	6	6	640
All	31	6	6	642.04
E. ½ sec. N. W. ¼, W. ½ S. W. & N. E. S. W	1	6	7	612.80
All	3	6	7	659.20
All	5	6	7	647.00
All	7	6	7	616.00
All	9	6	7	640
Total				*79,530.37

* East of the meridian & south of road.

148 North of base line and west of the 6th principal meridian, Nebraska. Selections under act of 2nd July, 1864.

Beatrice district. South of road.

Railroad List.

Parts of section.	Section.	Township.	Range.	Acres.
All	1	6	1 W.	641.16
All	3	6	1	641.40
All	5	6	1	639.60
All	7	6	1	650.68
All	9	6	1	640
All	11	6	1	640
All	13	6	1	640
All	15	6	1	640
All	17	6	1	640
All	19	6	1	656.20
All	21	6	1	640
All	23	6	1	640
All	1	6	2	636.01
All	3	6	2	634.12
All	5	6	2	634.84
All	7	6	2	630.68
All	9	6	2	640
All	11	6	2	640
All	13	6	2	640
All	15	6	2	640
All	17	6	2	640
All	19	6	2	632.40
All	21	6	2	640
All	23	6	2	640
All	25	6	2	640
All	27	6	2	640
All	29	6	2	640
All	1	6	3	639.12
All	3	6	3	638.40
All	5	6	3	637.78
All	7	6	3	638.20
All	9	6	3	640
All	11	6	3	640
All	13	6	3	640
All	15	6	3	640
All	17	6	3	640
Amount carried forward				23,030.59

149 North of base line and west of the 6th principal meridian, Nebraska. Selections under act of 2nd July, 1864.

Beatrice district. South of road.

Railroad List.

Parts of section.	Section.	Township.	Range.	Acres.
Amount brought forward				23,030.59
All	21	6	3 W.	640
All	23	6	3	640
All	1	6	4	638.00
All	3	6	4	639.20
All	5	6	4	641.20
All	7	6	4	653.80
All	9	6	4	640
All	11	6	4	640
All	1	6	5	640.00
All	3	6	5	640.52
All	5	6	5	641.00
All	7	6	5	632.44
All	9	6	5	640
All	11	6	5	640
All	1	6	6	641.52
All	3	6	6	644.00
All	5	6	6	638.72
All	7	6	6	623.24
All	9	6	6	640
All	11	6	6	640
All	1	6	7	641.52
All	3	6	7	634.52
All	5	6	7	640.48
All	7	6	7	635.68
All	9	6	7	640
All	11	6	7	640
Total				*39,656.43

* West of the meridian and south of road.

Recapitulation.

Situated south of the road.

	Acres.
Page 4, east of the meridian	79,530.37
Page 6, west of the meridian	39,656.43
Making total	119,186.80
(These figures are written with lead pencil:)	623.40
(These figures are written with lead pencil:)	118,563.40

(The following line is written with lead pencil:)

Assessed fees on 119,187 acres equal $744\frac{147}{160}$ @ $2 ..... $1,489 83

150 DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Before me, Ephraim K. Wilson, a notary public in and for said District, personally appeared Wm. T. Steiger, who, being duly sworn, deposes and says that he is the land agent of the Burlington and Missouri River Railroad Company in Nebraska; that the foregoing list of lands which he selects is a correct list of a portion of the public lands claimed by the said company as enuring to it to aid in the construction of said road, for which a grant of lands was made by the act of Congress approved 2d July, 1864 (13 Stat. U. S., p. 356); that said lands are vacant, unappropriated, and are not interdicted mineral nor reserve lands, and are of the character contemplated by the grant, being on each side of the line of route a continuous distance of one hundred and forty (140) miles, being for the first seven sections of twenty miles each of said road, starting from Plattsmouth and ending at the range line which divides ranges seven (7) and eight (8) west of the 6th principal meridian.

WM. T. STEIGER,
Agent B. & M. R. R. R. Co. in Neb.

Sworn to and subscribed before me this eighth day of December, anno Domini 1871.

[Seal E. K. Wilson, Notary Public, District of Columbia.]

EPH. K. WILSON,
Notary Public.

UNITED STATES LAND OFFICE,
BEATRICE, NEBRASKA, *April* 20, 1872.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Burlington and Missouri River Railroad Company in Nebraska on account of the grant by the act of Congress approved 2nd of July, 1864, (Stat. 13, p. 364) and selected December —, 1871, by Wm. T. Steiger, of Washington, D. C.,

the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands nor claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the act of Congress approved July 1st, 1864, and contemplated by the circular of instructions, dated January 24, 1867, addressed by the Commissioner of the
151 General Land Office to registers and receivers of the United States land offices, and that the said company have paid to the undersigned, the receiver, the full sum of fourteen hundred eighty-one dollars, in full payment and discharge of said fees.

HIRAM W. PARKER, *Register.*
NATHAN BLAKELY, *Receiver.*

List No. 1, B. & M. R. R. R. Co. Selected April 20, 1872.

Diagrams of Railroad Lines and 10 *and* 20 *Miles Limits and Diagrams of Reserve Lines.*

EXHIBIT "L."

NEBRASKA STATE LAND OFFICE, *Nov.* 29, 1892.

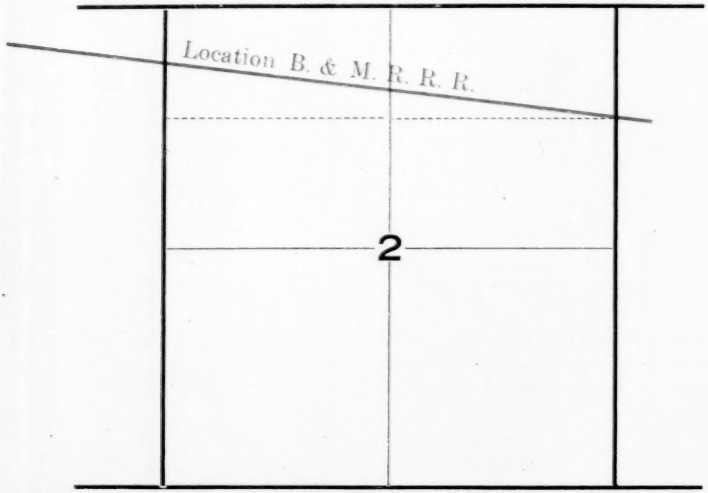
I, A. R. Humphrey, commissioner of public lands and buildings of the State of Nebraska, do hereby certify that the State of Nebraska has received from the General Government, under the internal-improvement act of 1841, 500,812 acres, after deducting all deficiencies on account of area.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of this office, at the city of Lincoln, on the day and year above written.

A. R. HUMPHREY,
Commissioner of Public Lands and Buildings.

EXHIBIT "M."

Map showing line of Burlington & Missouri River railroad in Neb., as located Nov. 12th to Nov. 15th, 1864, through sec. 2, T. 8 N., R. 3 E. Scale, 1 in. = 2,000 ft.



152 EXHIBIT "N."

WILBER, NEBR., *November 29th*, 1892.

The following is a statement of taxes on all of the section fourteen (14), township five (5) north, range three (3) east of the 6th P. M., viz:

	Year.	Am't of tax.	By whom paid.	Date of payment.
	1892	54 88		
	1891	58 21	Reinhard & Fieser	Ap'l 20, 1892.
	1890	62 28	Reinhard and Fieser	Apr. 18, 1891.
N. E. ¼ 14, 5, 3	1889	19 05	Jacob Reinhard	Apr. 24, 1890.
N. W. ¼, S. W. ¼, S. E. ¼ 14, 5, 3.	1889	52 39	Fred. Fieser	Apr. 24, 1890.
	1888	72 00	F. J. Hendershot	Apr. 20, 1889.
	1887	60 17	Jacob Reinhard	May 8, 1888.
	1886	62 36	Jacob Reinhard, by F. J. Hendershot.	March 22, 1887.
	1885	55 60	Jacob Reingard, by F. J. Hendershot.	Dec. 3, 1885.
	1884	58 32	Reinhard and Fieser	Dec. 31, 1884.
	1883	29 18	F. J. Hendershot	Apr. 12, 1884.
	1882	28 42	J. Reinhard	May 4, 1883.
	1881	39 37	J. Reinhard, by F. J. Hendershot.	March 27, 1882.
	1880	54 60	J. Reinhard	May 5th, 1881.
	1879	67 80	N. B. Kendall	Apr. 21, 1880.
	1878	81 44	J. Reinhard, by Kendall	Apr. 17, 1879.
	1877	43 38	D. S. Gray, trustee, per N. B. Kendall.	Apr. 16, 1878.
	1876	76 92	N. B. Kendall	May 21, 1877.
	1875	109 77	N. B. Kendall, ac't L. C. Neb. railway.	Aug. 16, 1876.
	1874	110 08	J. D. Lotridge, L. C	Aug. 28, 1875.
	1873	100 03	J. D. Lotridge	July 27, 1874.
	1872	79 56	Converse (2)	Date not given.
S. E. ¼ 14, 5, 3	1871	.....	Sold & redeemed by Saline Co.	

STATE OF NEBRASKA, } ss:
Saline County, }

I hereby certify that the above is a true and correct statement of all the taxes on the above-described land, to the best of my knowledge and belief.

[SEAL.]

E. J. SPIRK,
Co. Treas. of Saline County, Nebr.,
By C. J. JINDRA, *Deputy.*

Certificate.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, E. S. Dundy, Jr., master and examiner in chancery, duly appointed by the circuit court of the United States for the district of

Nebraska, in the eighth circuit, do hereby certify that — the
153 days named in the depositions hereto annexed I was attended, at my office named in the annexed notice, in the city of Omaha, by the counsel and witnesses aforesaid; that the said witnesses were duly sworn and examined, and the depositions were reduced to writing and read to the witnesses and by them subscribed in my presence.

I further certify that Exhibits E to I inclusive, (true, exact and perfect copies of which are hereto attached, and marked Exhibits E, F, G, H & I) were introduced in evidence in said cause during the taking of said depositions, and that Exhibits A, B, C, C½, D, D½, F, K, L, M & N are the original exhibits offered at time of taking of said testimony.

Dated Omaha, Dec. 8, 1892.

E. S. DUNDY, JR.,
Master and Examiner in Chancery.

Fees.

Depositions, 276 folios, at 20 cents per folio	$55 20
Swearing 10 witnesses, at 10 cents	1 00
Per diem	10 00
10 exhibits, at 10 cents each	1 00
Copy exhibits, 261 fols. at 10c	26 10
Certificate	35
	$93 65

Upon the back of said testimony appear indorsements in words and figures following, to wit: No. 266 M. James M. Deweese, Jr. *vs.* Jacob Reinhard, *et al.* Testimony on behalf of the complainant. Filed Dec. 14, 1892. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the May term of said court, on the 10th day of May, A. D. 1893, the following proceedings were had and done in said cause as appears of record on folio 471, Journal "R" of said court, to wit:

Cause Submitted.

JAMES M. DEWEESE, JR.,
vs.
JACOB REINHARD *et al.* } 266 M.

This cause coming on for hearing on the regular call of the docket; and thereupon came the defendants, by their solicitors, Charles Offutt and C. E. Magoon, but the complainant failed to appear either in person or by counsel.

154 Thereupon the court heard the argument on behalf of the defendants upon the merits and took said cause under consideration.

Thereupon, afterwards, to wit, at the said May term of said court, on the 2nd day of June, 1893, the following proceedings were had and done in said cause as appears of record on folio 564, Journal "R" of said court, to wit:

Final Decree.

JAMES M. DEWEESE, JR., Complainant,
vs.
JACOB R. REINHARD, LOUISA FIESER, LOUIS P. FIESER, BERTHA M. KRAUS, and GEORGE C. KRAUS, Defendants.

Now on this Wednesday, May 31st, 1893, this cause came on for hearing on the pleadings and the proofs, and the same having been argued by G. M. Lambertson, and James W. Deweese, solicitors for the complainant, James M. Deweese, Jr., and Charles E. Magoon and Chas. Offutt, solicitors for the defendants, Jacob R. Reinhard, Louisa Fieser, Louis F. Fieser, Bertha M. Kraus and George C. Kraus, and the said cause having been submitted; and the court being sufficiently advised thereon, does find for the said defendants and against the said complainant on all the issues herein, and that the said complainant's cause is without equity and that the said complainant is without the right to any relief against said defendants, or any of them.

It is thereupon considered, adjudged and decreed that the said complainant take nothing and have no relief herein; that the said complainant's bill of complaint be and the same is hereby dismissed, and the temporary injunction herein granted the said complainant be, and the same is hereby dissolved at the cost of the said complainant.

And it is further adjudged and decreed that the said defendants Jacob R. Reinhard, Louisa Fieser, Louis F. Feiser, Bertha M. Kraus and George C. Kraus and each and all of them, go hence without day and that they recover from the said complainant their costs herein expended taxed at $—, and that they may have execution therefor. And thereupon complainant in open court prays an appeal, which is allowed.

(S'g'd) ELMER S. DUNDY, *Judge.*
2 June, 1893.

155 Thereupon, afterwards, to wit, on the 7th day of June, 1893, petition for appeal and assignment of error were filed in said case; which said petition and assignment are in words and figures following, to wit:

Petition for Allowance of an Appeal.

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. DEWEESE, Complainant,
vs.
JACOB REINHARD *et al.*, Respondents. } 266 M.

Comes now the said complainant, James M. Deweese, and prays the court for an appeal herein from the decree rendered in this action dismissing complainant's bill to the United States circuit court of appeals for the eighth circuit, and complainant hereto attaches his assignments of errors.

Wherefore complainant prays that an appeal to said circuit court of appeals be allowed, and that the court fix the amount of the supersedeas bond herein.

G. M. LAMBERTSON,
Solicitor for Complainant.

Assignments of Error.

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. DEWEESE, Complainant,
vs.
JACOB REINHARD *et al.*, Respondents.

Now comes the complainant, James M. Deweese, and says there is manifest error in the record of the proceedings in the above-entitled case, to wit:

1st. That said court erred in holding that there was no equity in the bill of complaint.

2nd. The court erred in holding that the complainant had not a sufficient interest or title to the land in controversy, and was not in a position to question the title of the respondents or invoke the aid of a court of equity to decree that respondents held the title to the land in controversy in trust for complainant.

156 3rd. The court erred in holding that the complainant could not maintain his bill because his right, title, and interest in the land in controversy arose subsequent to the selection of the lands in controversy by the State of Nebraska, under an act of Congress approved September 4th, 1841, granting five hundred thousand (500,000) acres of land to the State of Nebraska for internal improvements, and subsequent to the date of the deeds under which the respondents claim title.

4th. The court erred in refusing to hold that under the statutes of the United States the selection of the lands in controversy by the

State of Nebraska, under said internal-improvement act of Congress approved September 4th, 1841, and the confirmation of said selection by the Secretary of the Interior, was illegal and void.

5th. The court erred in holding that the State of Nebraska was authorized to select, and the United States authorized to confirm the selection by the State of Nebraska, of the lands in controversy, under and pursuant to said act of Congress approved September 4th, 1841, granting five hundred thousand (500,000) acres of land to the State of Nebraska, and that the title of respondents derived from and through said grant under said act of Congress was perfect as against the claim of complainant.

6th. The court erred in holding that the lands in question were subject to private entry, and therefore embraced in said act of Congress and subject to selection under said act of Congress approved September 4th, 1841.

7th. The court erred in holding that said lands were not double-minimum lands and were not subject to entry as a homestead by complainant, and that said complainant acquired no interest in said lands by virtue of his application to enter said lands as a homestead, and his residence thereon and improvements made.

8th. The court erred in holding that respondents were innocent purchasers of the lands in controversy, and therefore protected against the claim of complainant, and erred in holding that under the testimony the respondents had any title or interest in the lands.

9th. The court erred in dismissing the bill of complainant and in entering a decree for respondents, and erred in not entering a decree for complainant.

G. M. LAMBERTSON,
J. W. DEWEESE,
Attorneys for Complainant.

157 Upon the back of said petition and assignment appear indorsements in words and figures following, to wit: No. 266 M. James M. Deweese *vs.* Jacob Reinhard *et al.* Petition for appeal and assignment of error. Filed June 7, 1893. E. D. Frank, clerk. G. M. Lambertson and J. W. Deweese, solic-tors for complainant.

Thereupon, afterwards, to wit, at the May term of said court, on the 7th day of June, 1893, the following proceedings were had and done as appears of record on folio 572, Journal "R," of said court, to wit:

JAMES M. DEWEESE, JR., }
vs. }
JACOB REINHARD *et al.* }

This cause coming on for hearing on the petition for appeal filed by the complainant herein, and the court being fully advised in the premises, doth now on this day order that said petition for appeal be, and the same is hereby, allowed, and the supersedeas bond to be given is fixed at five hundred dollars.

Thereupon, afterwards, to wit, on the 13th day of June, 1893, bond was filed in said case; which said bond is in words and figures following, to wit:

Bond.

Know all men by these presents that we, James M. Deweese, as principal, and J. W. Deweese and Tobias Castor, as sureties, are held and firmly bound unto Jacob Reinhard *et al.* in the full and just sum of five hundred (500.00) dollars, to be paid to the said Jacob Reinhard *et al.*, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at the May term, A. D. 1893, of the circuit court of the United States for the district of Nebraska, in a suit depending in said court between James M. Deweese, Junior, plaintiff, and Jacob Reinhard *et al.*, defendants, a decree was rendered against the said James M. Deweese, Junior, and the said James M. Deweese, Jr.,
158 has obtained allowance of an appeal of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said James Reinhard *et al.*, citing and admonishing them to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said James M. Deweese, Jr., shall prosecute said appeal to effect and answer all damages and costs if he fail to make good the said appeal, then the above obligation to be void; else to remain in full force and virtue.

JAMES M. DEWEESE, JR., [SEAL.]
Per J. W. DEWEESE, *His Att'y.*
J. W. DEWEESE, *Surety.*
TOBIAS CASTOR, *Surety.*

Sealed in the presence of—
—— ——.

Approved by—
ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear indorsements in words and figures following, to wit: No. 266 M. United States circuit court, district of Nebraska. James M. Deweese, Jr., *vs.* Jacob Reinhard *et al.* Bond. $500.00. Filed 13th day of June, 1893. E. D. Frank, clerk.

Thereupon, afterwards, to wit, on the 15th day of July, 1893, stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. DEWEESE, JR., Complainant,
vs.
JACOB REINHARD *et al.*, Respondents.

It is hereby stipulated and agreed by and between the complainant and defendants that the original exhibits attached to the depositions taken in behalf of the said complainant, marked Exhibits "D," "J," "K," and the original exhibits attached to depositions taken and offered in evidence on behalf of respondents,
159 marked Exhibits D½ and "M," may be included in the record to be prepared by the clerk of said court to be filed in the circuit court of appeals by the appellant, and shall have the same force and effect as copies of said records.

This stipulation is made because of the difficulty of making copies of the maps, diagrams and documents attached to the said depositions and marked as exhibits as above set forth.

CHAS. E. MAGOON,
Solicitor for Respondent.
G. M. LAMBERTSON,
Att'y for Complainant.

Upon the back of said stipulation appear indorsements in words and figures following, to wit: No. 266 M. James M. Deweese, Jr., *vs.* Jacob Reinhard *et al.* Stipulation. Filed Jul- 15, 1893. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit: on the 28th day of July, 1893, a citation was duly issued in said case, the following of which is the original.

The United States of America to Jacob R. Reinhard, Louisa Fiesner, Louis F. Fiesner, Bertha M. Kraus, and George C. Kraus, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by the circuit court of the United States for the district of Nebraska, wherein James M. Deweese, Jr., is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Elmer S. Dundy, judge of the circuit court of the United States for the district of Nebraska, this 21st day of July, in the year of our Lord one thousand eight hundred and ninety-three.

ELMER S. DUNDY,
United States District Judge for the District of Nebraska.

160 Service of the foregoing citation is hereby accepted on behalf of the appellee.
Dated July 27th, 1893, Lincoln, Nebraska.

CHAS. E. MAGOON,
Solicitor for Appellees.

No. 266 M. United States circuit court, district of Nebraska. James M. Deweese, Jr., *vs.* Jacob Reinhard *et al.* Citation. Filed Jul- 28, 1893. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit: at the May term of said court on the 16th day of July, 1893, the following proceedings were had and done in said cause as appears of record on folio 600 Journal "R" of said court, to wit:

JAMES M. DEWEESE, JR., *vs.* JACOB REINHARDT *et al.* } 266 M.

Upon motion of complainant to have time extended in which to file and docket the appeal allowed in the above-entitled action on the ground that the clerk is unable to prepare the record sooner, it is ordered that the time is extended in which to file and docket said appeal in the United States circuit court of appeals to 15th day of September, 1893.

UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the foregoing folios from one to one hundred and eighty, contain true and faithful transcripts from the pleadings and proceedings of record and on file in my said office as such clerk and the whole thereof and the indorsements thereon, in the case of James M. Deweese, Jr., *vs.* Jacob R. Reinhard, *et al.*, and that a copy of the citation herein has been lodged and remains in my said office.

Witness my hand and the seal of the said court, at Omaha, Nebraska, this 23rd day of August, A. D. 1893.

Seal of the United States Circuit Court, District of Nebraska.

E. D. FRANK, *Clerk.*

Received August 31, 1893, and filed Oct. 9, 1893. John D. Jordan, clerk.

161 *Appearance for Appellant.*

And on the 9th day of October, A. D. 1894, an appearance for appellant was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1893.

JAMES M. DEWEESE, JR., Appellant,
vs.
JACOB REINHARD *et al.*
} No. 364.

The clerk will enter our appearance as counsel for the appellant.

G. M. LAMBERTSON,
J. W. DEWEESE,
Solicitors for Appellant.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1893. No. 364. James M. Deweese, Jr., appellant, *vs.* Jacob Reinhard *et al.* Appearance. Filed Oct. 9, 1893. John D. Jordan, clerk. G. M. Lambertson, J. W. Deweese, counsel for appellant.

Appearance for Appellees.

And on the 22nd day of January, A. D. 1894, an appearance for appellees was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1893.

162 JAMES M. DEWEESE, JR., Appellant,
vs.
JACOB REINHARD *et al.*
} No. 364.

The clerk will enter my appearance as counsel for the appellee-.

CHAS. MAGOON.
CHAS. OFFUTT.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1893. No. 364. James M. Deweese, Jr., appellant, *vs.* Jacob Reinhard *et al.*, appellees. Appearance. Filed Jan. 22, 1894. John D. Jordan, clerk. Chas. Magoon and Chas. Offutt, counsel for appellees.

Stipulation.

And on the 26th day of February, A. D. 1894, a stipulation to correct and amend record was filed in said cause in the following words, to wit:

In the Circuit Court of Appeals of the United States.

JAMES M. DEWEESE, JR.,
vs.
JACOB REINHARD *et al.*
} Stipulation.

Diminution of the record herein having been suggested by each of the parties hereto, it is hereby stipulated by the parties hereto that the record herein shall be, and the same is hereby, amended as follows, to wit:

1. By inserting on page 120 of the printed record, immediately after the sixth line from the top of the page, and on page 137 of the copy of the original record certified up from the circuit court of the United States for the district of Nebraska, immediately after the eighth line from the top of the page, the following: "In town-
163 ship five (5) north, of range three (3) east, of the 6 P. M.: All of section fourteen (14), containing six hundred and forty (640) acres."

2. The letter appearing on pages 139 and 140 of the printed record and on pages 160, 161, and 162 of the copy of the original record was offered and introduced in evidence by the appellant, the foregoing being the letter of Commissioner Wilson to the register & receiver at Brownville, Neb., of date March 1, 1867.

And the record herein is hereby amended in accordance with the facts herein stipulated.

Feb'y 26, 1894.

JACOB REINHARD ET AL.,
By CHAS. OFFUTT, *Their Solicitor.*
JAMES M. DEWEESE, JR.,
By G. M. LAMBERTSON,
His Solicitor.

Endorsed: No. 364. James M. Deweese, Jr., appellant, *vs.* Jacob Reinhard *et al.* Stipulation to correct description in deed. Filed Feb. 26, 1894. John D. Jordan, clerk.

Order of Submission.

And on the 26th day of February, A. D. 1894, in the record of the proceedings of said court, is an entry of submission of said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1893.

MONDAY, *February* 26, 1894.

JAMES M. DEWEESE, JR., Appellant,
vs.
JACOB REINHARD *et al.*, Appellees. } No. 364.

Appeal from the circuit court of the United States for the district of Nebraska.

164 This cause having been called for hearing in its regular order, argument was commenced by Mr. G. M. Lambertson in behalf of appellant, continued by Mr. Charles Offutt and Mr. Charles E. Magoon in behalf of appellees, and concluded by Mr. G. M. Lambertson for appellant. Thereupon this cause was submitted to the court upon the transcript of the record from said circuit court and the briefs of counsel filed herein.

Opinion.

And on the 7th day of May, A. D. 1894, an opinion of said court was filed in said cause in the following words, to wit:

165 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1894.

JAMES M. DEWEESE, JR., Appellant, *vs.* JACOB REINHARD, LOUISA FIESER, LOUIS P. FIESER, BERTHA M. KRAUS, and GEORGE C. KRAUS, Appellees.	No. 364. Appeal from the Circuit Court of the United States for the District of Nebraska.

Mr. G. M. Lambertson (Mr. J. W. Deweese was with him on the brief), for the appellant.

Mr. Charles E. Magoon and Mr. Charles Offutt, for the appellees.

Before Caldwell and Sanborn, circuit judges, and Thayer, district judge.

Statement.

This is a suit which was brought by the appellant for the purpose of quieting his title to the northeast quarter of section 14, township number 5, range 3, in Saline county, State of Nebraska. The record discloses the following facts:

That the land in controversy together with other lands was selected by the State of Nebraska, on March 26, 1868, under the provisions of an act of Congress approved September 4, 1841 (5th Statutes 455, sec. 8), which granted to each new State thereafter admitted into the Union five hundred thousand acres of land for the purposes of internal improvement; that such selection of lands was duly approved by the Secretary of the Interior on March 29, 1870, who caused the same to be duly certified to the State of Nebraska on April 7, 1870; that the State afterwards granted one hundred thousand acres of land, including the tract now in
166 controversy, to the Midland Pacific Railway Company, and on July 19, 1871, issued a patent therefor to the railway company; that the appellees have since acquired the title of the Midland Pacific Railway Company to the premises in dispute under and by virtue of several mesne conveyances, the last of which was a deed to the appellees executed on November 11, 1878.

Nearly five years after the date of the conveyance to the appellees, to wit: on May 31, 1883, the complainant settled on the tract of land now in question claiming the right to make such settlement under and by virtue of the homestead laws of the United States. In support of his settlement he prepared the requisite affidavit and an application for permission to enter the land as a homestead and presented the same to the register of the proper land office of the United States at Beatrice, Nebraska, on May 31, 1883. The application for a homestead entry was forthwith rejected by the register

on the ground that the lands had been selected by the State on March 26, 1868, and that such selection had been approved by the Secretary of the Interior on March 29, 1870. An appeal was taken by the complainant from the decision of the register rejecting the aforesaid application, which appeal was based on the ground that the lands in dispute, at the time of their selection by the State, lay within the twenty-mile limits of a grant made to the Burlington and Missouri River Railroad Company in Nebraska by an act of Congress approved on July 2, 1864, and that the same were not subject to selection by the State of Nebraska under the act of September 4, 1841. On the hearing of the aforesaid appeal before the Commissioner of the General Land Office, that officer affirmed the action of the register in rejecting the application for a homestead entry; such order of affirmance was made by the Commissioner on July 7, 1883. On a further appeal to the Secretary of the Interior the action of the Commissioner of the General Land Office was affirmed on January 18, 1884, the Secretary stating in substance that the previous certification of the lands to the State of Nebraska was a final adjudication of all questions pertaining to the title to the lands in controversy so far as the Department of the Interior was concerned. Notwithstanding the foregoing proceedings the appellant continued in possession of the lands until July 6, 1888, and on that date, after due notice, he presented the requisite proofs to the register of the land office at Beatrice, Nebraska, that he had resided on and cultivated the lands in question for a period of five years and more from the date of his entry. These final proofs of residence and cultivation were likewise rejected by the register, because the lands had been selected by and duly certified to the State of Nebraska in the years 1868 and 1870. The contention of the complainant before the circuit court, was, that the lands had been unlawfully selected by and certified to the State because they were within the limits of an antecedent grant to the Burlington and Missouri River Railroad Company. At the same time, however,
167 he contended that they were subject to homestead entry and that they had been duly appropriated by himself under the provisions of the homestead laws. The bill contained a prayer in the alternative that the complainant's title might be quieted against the claim of the defendants, or that in lieu thereof, it might be decreed that the defendants took the legal title to the premises in controversy in trust for the complainant, and that they might be required to convey the same to him. The bill was dismissed on final hearing for want of equity, whereupon the complainant prayed an appeal to this court.

THAYER, district judge, after stating the case as above, delivered the opinion of the court:

At the threshold of this case we are confronted with the question whether the appellant stands in such privity with the United States as entitles him to maintain a suit to annul the certification of the land in dispute to the State of Nebraska, which act on the part of the Secretary of the Interior, had the legal force and effect of a

patent. Frazier *v.* O'Connor, 115 U. S., 102. It will be observed from the foregoing statement that the alleged equitable title which the appellant seeks to enforce, not only had its origin in a settlement made upon the land in controversy, more than fifteen years after it had been certified to the State in supposed compliance with the provisions of existing laws, but that such settlement was also made by the appellant with full knowledge, actual or constructive, that the State of Nebraska had issued a patent for the land more than twelve years previous to the attempted settlement, and that in the meantime, the land had been several times conveyed to private parties. Moreover, the appellant's application to enter the land as a homestead was rejected by the proper land office, on the very day that his entry upon the land is said to have been made, because of the prior selection of the same by the State, and on an appeal duly prosecuted to the Commissioner of the General Land Office, and to the Secretary of the Interior, the action of the local land officer in rejecting the application for entry was speedily approved by both of those officers. There is nothing in the record now before us which shows that any officer of the Land Department at any time recognized the appellant's right to enter the land as a homestead or authorized the settlement thereon which he saw fit to make. From the date of his entry on May 31, 1883, until the rejection of his final proof in July, 1888, the appellant appears to have occupied the premises without the sanction of any officer of the Government, either express or implied. It is insisted, however, that the appellant has succeeded to all of the rights of the United States with respect to the land in question and is entitled to challenge the appellee's title thereto, notwithstanding the facts aforesaid, because the laws of the United States gave him the right to appropriate the land as a homestead, which right could not be impaired or defeated by the officials of the Land Department, it being land that
168 had been unlawfully selected by the State. We do not dispute the general proposition that a person becomes the equitable owner of a tract of land forming a part of the public domain, if it has been surveyed and placed on the market, when he makes a prior settlement thereon under the homestead or pre-emption laws of the United States, and subsequently complies with all of the terms and conditions of those laws which entitle him to a patent. It may also be conceded that the right of a homestead or pre-emption claimant to a patent, when he has made a lawful settlement and done everything required of him to perfect his claim, cannot be prejudiced either by the intentional misconduct of the officers of the Land Department, or by their mistakes of law, or neglect of duty. Moreover, it may be admitted that the holder of an equitable right or title to a tract of land, which has been acquired in the manner aforesaid by a lawful settlement thereon and by the performance of such other acts as the law prescribes to entitle a settler to a patent, stands in privity with the Government in such sense that he may maintain a bill to cancel a patent erroneously issued to a third party for the same land, after the settler's rights had become vested. These principles find sufficient illustration and sup-

port in the following cases: Lytle, *et al.*, *v.* The State of Arkansas, *et al.*, 9 How., 314; Shepley, *et al.*, *v.* Cowan, *et al.*, 91 U. S., 330; Barnard's Heirs *v.* Ashley's Heirs, 18 How., 43; Cunningham *v.* Ashley, 14 How., 377; Worth *v.* Branson, 98 U. S., 118.

But is it a necessary or even a reasonable deduction from these premises that after the Government has granted a patent for a tract of land forming a part of the public domain, a third party may then make a settlement on the same land without the consent of those officers of the Government who are charged with the custody and control of the public lands and with the administration of the land laws, and having made a settlement under such circumstances, may then maintain a bill in his own name to annul the prior grant, which the Government, for a long period of years, has shown no disposition to disturb? We think that this question should be answered in the negative both upon principle and authority. One who makes a homestead or pre-emption settlement under the circumstances last supposed and with the knowledge that it has been patented to and is claimed by another, does so with the evident intention of taking advantage of the mistakes of others, and in the forum of equity should not be allowed the same privilege of assailing a patent, which may justly be conceded to one who seeks to enforce an equitable title to land, that had its origin in a settlement made before the Government parted with the legal title. In the former case a person who makes a settlement with knowledge of a prior grant, thereby places himself in an attitude of open hostility to the executive department of the Government, usually for the purpose of speculating on a flaw in his neighbor's title, and
169 while occupying that attitude, we think that he should not be allowed, as complainant in a suit in equity, to challenge the validity of the prior grant, which it may be inexpedient and clearly inequitable to call in question. Cragin *v.* Powell, 128 U. S., 692, 700. The Government ought to have as much discretion as a private grantor in determining whether it will assail the validity of its own grant, especially in cases like the one at bar, where no right had attached in favor of third parties when the grant was made. If there is a defect in the appellees' title Congress may deem it both expedient and just to remedy the defect by appropriate legislation, and no one can doubt its power to do so, notwithstanding the title asserted by the complainant, in view of the circumstances under which that title was acquired. We think that the authorities fully support the foregoing views. In Cooper *v.* Roberts, 18 How., 173, the plaintiff claimed a tract of land under a patent issued by the State of Michigan, which was occupied by the defendant as mineral land under a lease executed by the Secretary of War. It was held that the land had been lawfully appropriated by the State as school land at the date of its patent, under an act of Congress granting to the State the sixteenth section in each township for the maintenance of public schools. Thereupon the defendant sought to impeach the patent on the ground that it had been issued in violation of the laws of Michigan. But the court said, speaking through Mr. Justice Campbell, that the defendant did not claim in privity with the State

of Michigan and was not in a position to question the validity of its grant; that as the State had not seen fit to complain of the patent the defendant could not be heard to do so. In the case of Spencer *v.* Lapsley, 20 How., 264, 273, the same principle was reaffirmed and applied. In that case the plaintiff claimed under a title which had emanated from the State of Coahuila and Texas years before the defendant had made a settlement on the premises in dispute. The defendant attempted to impeach the grant on which the plaintiff relied because it had not been executed in conformity with the laws of the State or sovereignty from which it had emanated; but the court said, again speaking through Mr. Justice Campbell, that he was a mere volunteer who had entered on the land after it was granted, and that he had no commission to challenge a grant which the State, for a quarter of a century, had not seen fit to disturb. The case of Beard *v.* Federy, 3 Wall., 478, also seems to us to have an important bearing on the point at issue. In that case the act of Congress authorizing the issuance of the patent under which the plaintiff claimed, provided that the patent should be "conclusive between the United States and said claimants only, and should not affect the interests of third persons." But the Supreme Court held that the term "third persons" as used in said act did not embrace all persons who might assert a title to the land covered by the patent, but only such persons as might have acquired a superior equitable title thereto by acts done before the patent was issued, and
170 that as against all other persons a patent issued under the provisions of the act was conclusive and not subject to attack. It was also held in Field *v.* Seabury *et al.*, 19 How., 323, and the doctrine is now well established, that a patent for land can only be impeached for fraud at the suit of the Government. See also to the same effect Smelting Co. *v.* Kemp, 104 U. S., 636, 657; Vance *v.* Burbank, 101 U. S., 514; Crommelin *v.* Minter, 9 Ala., 594; Doll *v.* Meador, 16 Cal., 295. It will be found, we think, on a critical examination of all of the Federal adjudications, that in no case has a person, who had a merely equitable claim to a tract of land, as yet been allowed to maintain a bill to cancel a patent, or to quiet his title as against an outstanding patent issued to a third party for the same land, or to have the patentee adjudged to be a trustee of the legal title, unless the equitable title asserted by the complainant had its origin in a settlement made upon the land before the patent was issued and before the patentee had done any act with a view of appropriating the property and securing a patent therefor. In no case does it appear that a bill of the present nature has been successfully prosecuted by a claimant whose rights had their origin years after the Government had parted with the legal title. In making this statement we have not overlooked the decision in Doolan *v.* Carr, 125 U. S., 618, on which the appellant's counsel places much reliance.

In that case it was decided that a defendant in a suit in ejectment had the right to show by appropriate evidence that the patent under which his adversary claimed was utterly void. The court appears to have sustained the admissibility of such evidence, in obedience

to the old and familiar rule, that in an ejectment suit the plaintiff always exposes his own title to attack and must recover altogether on the strength thereof rather than on the weakness of his adversary's title. But we do not understand that the court intended to go beyond that point, or to hold that a homestead claimant may maintain a bill in equity, to cancel, or to obtain the benefit of a patent issued to a third party, when as in the present case, the settlement on which the claimant relies was made without the sanction of the officers of the Land Department and years after the patent in question was issued. That view of the case seems to us to be utterly irreconcilable with sound doctrine and the decisions heretofore cited. Our conclusion is that the complainant's bill was properly dismissed for the reasons herein stated, and without deciding the other questions that are presented by the record, the decree of the circuit court will be—

Affirmed.

Filed May 7, 1894.

171 *Final Decree.*

And on the 7th day of May, A. D. 1894, in the record of the proceedings of said court is an entry of final decree in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

MONDAY, *May* 7, 1894.

JAMES M. DEWEESE, JR., Appellant,
vs.
JACOB REINHARD, LOUISA FIESER, LOUIS P. FIESER, BERTHA M. KRAUS, and GEORGE C. KRAUS, Appellees. } No. 364.

Appeal from the circuit court of the United States for the district of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska, and was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Jacob Reinhard, Louisa Fieser, Louis P. Fieser, Bertha M. Kraus, and George C. Kraus recover against James M. Deweese, Jr., the sum of twenty dollars for their costs herein, and have execution therefor.

May 7, 1894.

Petition for Appeal.

And on the 13th day of July, A. D. 1894, a petition for appeal was filed in said cause in the following words, to wit:

172 United States Circuit Court of Appeals for the Eighth Circuit.

JAMES M. DEWEESE, JUNIOR, Appellant,
vs.
JACOB R. REINHARD, LOUISA FIESER, LOUIS F. FIESER, BERTHA M. KRAUS, and GEORGE C. KRAUS, Appellees.

The above-named appellant, James M. Deweese, Junior, conceiving himself aggrieved by the order and decree of this court entered on the 7th day of May, A. D. 1894, in the above-entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that his appeal may be allowed, and that a transcript of the record, proceedings, and papers on which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

G. M. LAMBERTSON AND
J. W. DEWEESE,
Solicitors for Appellant, James M. Deweese, Junior.

And now, to wit, on the 13 day of July, A. D. 1894, it is ordered that the appeal be allowed, as prayed for, and the supersedeas bond is fixed at three thousand dollars.

AMOS M. THAYER,
Judge of Cir. Ct. of Appeals.

Endorsed: No. 364. James M. Deweese, Jr., *vs.* Jacob R. Reinhard, Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus. Petition for appeal. Filed Jul- 13, 1894. John D. Jordan, clerk. G. M. Lambertson and J. W. Deweese, solicitors for appellant.

Supersedeas Bond.

173 And on the 13th day of July, A. D. 1894, a supersedeas bond was filed in said cause in *in* the following words, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

JAMES M. DEWEESE, JUNIOR, Appellant,
vs.
JACOB R. REINHARD, LOUISA FIESER, LOUIS F. FIESER, BERTHA M. KRAUS, and GEORGE C. KRAUS, Appellees. } Bond.

Know all men by these presents that we, James M. Deweese, Junior, as principal, and Bernard L. Castor, Tobias Castor, as sureties, are held and firmly bound unto Jacob R. Reinhard, Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus in the full and just sum of three thousand dollars, to be paid to the said Jacob R. Reinhard, Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at the May term, A. D. 1893, of the circuit court of the United States for the district of Nebraska, in a suit pending in said court between James M. Deweese, Junior, appellant, and Jacob R. Reinhard, Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus, appellees, a decree was rendered against the said James M. Deweese, Junior, and the said James M. Deweese, Junior, obtained an allowance of an appeal of the said court to the United States circuit court of appeals for the eighth circuit to reverse said decree in the aforesaid suit; and

Whereas, at the May term, A. D. 1894, of the United States circuit court of appeals for the eighth circuit, a decree was rendered affirming the decree of the circuit court of the United States for the district of Nebraska, dismissing the bill of the said complainant; and

174 Whereas the above-named James M. Deweese, Junior, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Nebraska and the affirmance thereof by the United States circuit court of appeals for the eighth circuit:

Now, therefore, the condition of this obligation is such that if the above-named James M. Deweese, Junior, shall prosecute said appeal to effect and answer all damages and costs if he fail to make good the said appeal, then the above obligation to be void; else to remain in full force and virtue.

JAMES M. DEWEESE, JUNIOR,
By J. W. DEWEESE, *His Att'y.* [SEAL.]
BERNARD L. CASTOR. [SEAL.]
TOBIAS CASTOR. [SEAL.]

Sealed in presence of—
G. M. LAMBERTSON.

Approved, to operate as a supersedeas, by—
A. M. THAYER, *Judge.*

United States Circuit Court of Appeals for the Eighth Circuit.

JAMES M. DEWEESE, JUNIOR, Appellant,
vs.
JACOB REINHARD, LOUISA FIESER, LOUIS F. FIESER, BERTHA M. KRAUS, and GEORGE C. KRAUS, Appellees, } Affidavit.

STATE OF NEBRASKA, *Lancaster County,* } *ss:*

Bernard L. Castor, being first duly sworn, upon oath says that he is a resident of Saline county, Nebraska, and has resided in said county for about thirty-two years last past, and that he is engaged in the real-estate and insurance —.

175 Affiant says that he is worth over and above all his liabilities and exemptions the sum of five thousand (5,000) dollars; that his property consists largely of real estate situated in Saline, Gage, and Webster counties, in the State of Nebraska; and further affiant saith not.

BERNARD L. CASTOR.

Subscribed in my presence and sworn to before me this 10th day of July, A. D. 1894.

E. J. HEDGES,
Notary Public.

[SEAL.]

My commission expires March 28th, 1899.

United States Circuit Court of Appeals for the Eighth Circuit.

JAMES M. DEWEESE, JUNIOR, Appellant,
vs.
JACOB R. REINHARD, LOUISA FIESER, LOUIS F. FIESER, BERTHA M. KRAUS, and GEORGE C. KRAUS, Appellees.
} Affidavit.

STATE OF NEBRASKA, *Lancaster County,* } *ss:*

Tobias Castor, being first duly sworn, upon his oath says that he is a resident of Lancaster county, Nebraska, and has resided in said county and State for about thirty-two years last past, and that he is engaged in the railway business as right-of-way agent for the Burlington & Missouri River Railroad Company in Nebraska.

Affiant says that he is worth over and above all of his liabilities and exemptions the sum of ten thousand (10,000) dollars, which property consists largely of real estate situated in the State of Nebraska; and further affiant saith not.

TOBIAS CASTOR.

Subscribed in my presence and sworn to before me this 11th day of July, A. D. 1894.

176 WM. B. KIRBY,
Notary Public.

[SEAL.]

My commission expires ——, —.

United States Circuit Court of Appeals for the Eighth Circuit.

JAMES M. DEWEESE, JUNIOR, Appellant,
vs.
JACOB REINHARD *et al.*, Appellees.

Value of Land in Controversy.

1. The appellant in his bill, on page 1 of the Record, alleges the value of the land to be $3,000.00.

2. The appellees in their answer, page 7, allege the value of the land to greatly exceed $3,000.00, and on pages 8 and 9 allege that they paid $1,500.00 for the land. On page 13 appellee Jacob Rein-

hard alleges that he paid $12.00 per acre for the land, and appellee Frederick Fieser, on page 14, alleges he paid $12.00 per acre.

3. James M. Deweese, Junior, on page 24, testifies that the value of the improvements is from $1,600 to $1,800, and Elmer Castor, on page 42, fixed the value at from $1,700 to $1,800, and on page 72 Christopher Young fixes the value of the land at $3,500, and Joseph Hubbell, on page 76, fixes the value of the land at $3,500.00.

Endorsed: No. 364. James M. Deweese, Jr., *vs.* Jacob R. Reinhard, Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus. Supersedeas bond on appeal. Filed Jul- 13, 1894. John D. Jordan, clerk. G. M. Lambertson and J. W. Deweese, solicitors for appellant.

Assignment of Errors.

177 And on the 13th day of July, A. D. 1894, an assignment of errors was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

JAMES M. DEWEESE, JUNIOR, Appellant,
vs.
JACOB R. REINHARD, LOUISA FIESER, LOUIS F. FIESER, BERTHA KRAUS, and GEORGE C. KRAUS, Appellees. } Assignments of Error.

And now comes said James M. Deweese, Junior, appellant, and says that in the record and proceedings and in rendering the decree in the circuit court of the United States for the district of Nebraska in the above-entitled cause there is manifest error in this:

1. That the circuit court of the United States for the district of Nebraska erred in dismissing the bill of the complainant, James M. Deweese, Junior, for want of equity.

2. That the United States circuit court of appeals for the eighth circuit erred in affirming the decree of the circuit court of the United States for the district of Nebraska.

3. The United States circuit court of appeals for the eighth circuit erred in holding that the appellant, James M. Deweese, Junior, was not in such privity with the title as to prosecute in equity the bill filed.

4. On his appeal to the Supreme Court of the United States the appellant renews the assignments of error set out in the record, upon which an appeal was allowed from the circuit court of the United States for the district of Nebraska to the United States circuit court of appeals for the eighth circuit.

By reason whereof appellant prays that the decree of the circuit court of the United States for the district of Nebraska and the affirmance thereof by the United States circuit court of appeals for the eighth circuit may be reversed.

G. M. LAMBERTSON,
J. W. DEWEESE,
Solicitors for Appellant, James M. Deweese, Junior

178 Endorsed: No. 364. James M. Deweese, Jr., *vs.* Jacob R. Reinhard, Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus. Assignment of errors. Filed Jul- 13, 1894. John D. Jordan, clerk. G. M. Lambertson and J. W. Deweese, solicitors for appellant.

Order Allowing Appeal.

And on the 13th day of July, A. D. 1894, an order allowing appeal to the Supreme Court of the United States and recalling mandate from the circuit court was filed and entered in said cause in the following words:

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1894.

JAMES M. DEWEESE, JR., Appellant,
vs.
JACOB REINHARD *et al.*, Appellees. } No. 364.

Appeal from the circuit court of the United States for the district of Nebraska.

Now comes the appellant, James M. Deweese, Jr., and files a petition for the allowance of an appeal to the Supreme Court of the United States from the decree of this court entered on the 7th day of May, A. D. 1894, affirming the decree of the circuit court of the United States for the district of Nebraska, and the said appellant having filed a bond in the penal sum of three thousand dollars ($3,000), the said bond is hereby approved to operate as a supersedeas of the decree of this court, and an appeal is allowed to the Supreme Court of the United States as prayed in said petition; and it appearing that a mandate from this court has issued to the said circuit court of the United States for the district of Nebraska, it is now here ordered by this court that said mandate be, and the same is hereby, recalled.

179 July 13, 1894.
Approved.

AMOS M. THAYER, *Judge.*

Endorsed: No. 364. James M. Deweese, Jr., appellant, *vs.* Jacob Reinhard *et al.* Order allowing appeal and recalling mandate. Filed Jul- 13, 1894. John D. Jordan, clerk.

And on the 19th day of July, A. D. 1894, the original citation issued in said cause on the 13th day of July, A. D. 1894, was returned and filed in the clerk's office of said court; which original citation, with the acknowledgment of service endorsed thereon, is hereto attached and herewith returned.

180 The United States of America to Jacob Reinhard, Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States circuit court of appeals, eighth circuit, wherein James M. Deweese, Jr., is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the United States circuit court of appeals for the eighth circuit, this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-four.

AMOS M. THAYER,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] No. —. United States Supreme Court. James M. Deweese, Jr., appellant, *vs.* Jacob Reinhard *et al.* Citation on appeal. Service of this citation accepted this July 16, 1894. Chas. Offutt, sol'r for appellees. Filed Jul- 19, 1894. John D. Jordan, clerk. Marshal's costs: Service, 2.00.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 16th day of July, 1894, I received this citation, and on the 16th day of July, 1894, I served the same upon the within-named Jacob Reinhard, Louisa Fieser, Louis Fieser, Bertha M. Kraus, and George C. Kraus, by Charles Magoon, their attorney, in Douglas county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

FRANK E. WHITE,
United States Marshal for the District of Nebraska,
By —— ——,
Deputy United States Marshal.

Marshal's cost-: Service, $2.00.

181 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, numbered from one to 180, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of the said circuit court of appeals, in a certain cause wherein James M. Deweese, Jr., was appellant and Jacob Reinhard *et al.* were appellees, No. 364, May term, A. D. 1894, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation, with the return of service endorsed thereon, is hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, in the eighth circuit, this 26th day of July, A. D. 1894.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit

Endorsed on cover: Case No. 15,658. U. S. circuit court appeals, eighth circuit. Term No., 151. James M. Deweese, Jr., appellant, *vs.* Jacob Reinhard, Louisa Fieser, Louis F. Fieser, Bertha M. Kraus, and George C. Kraus. Filed August 6th, 1894.

05730

165-386

Office Supreme Court, U. S.
FILED.
DEC 26 1896
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 151.

JAMES M. DEWEESE, JR.,
Appellant,

v.

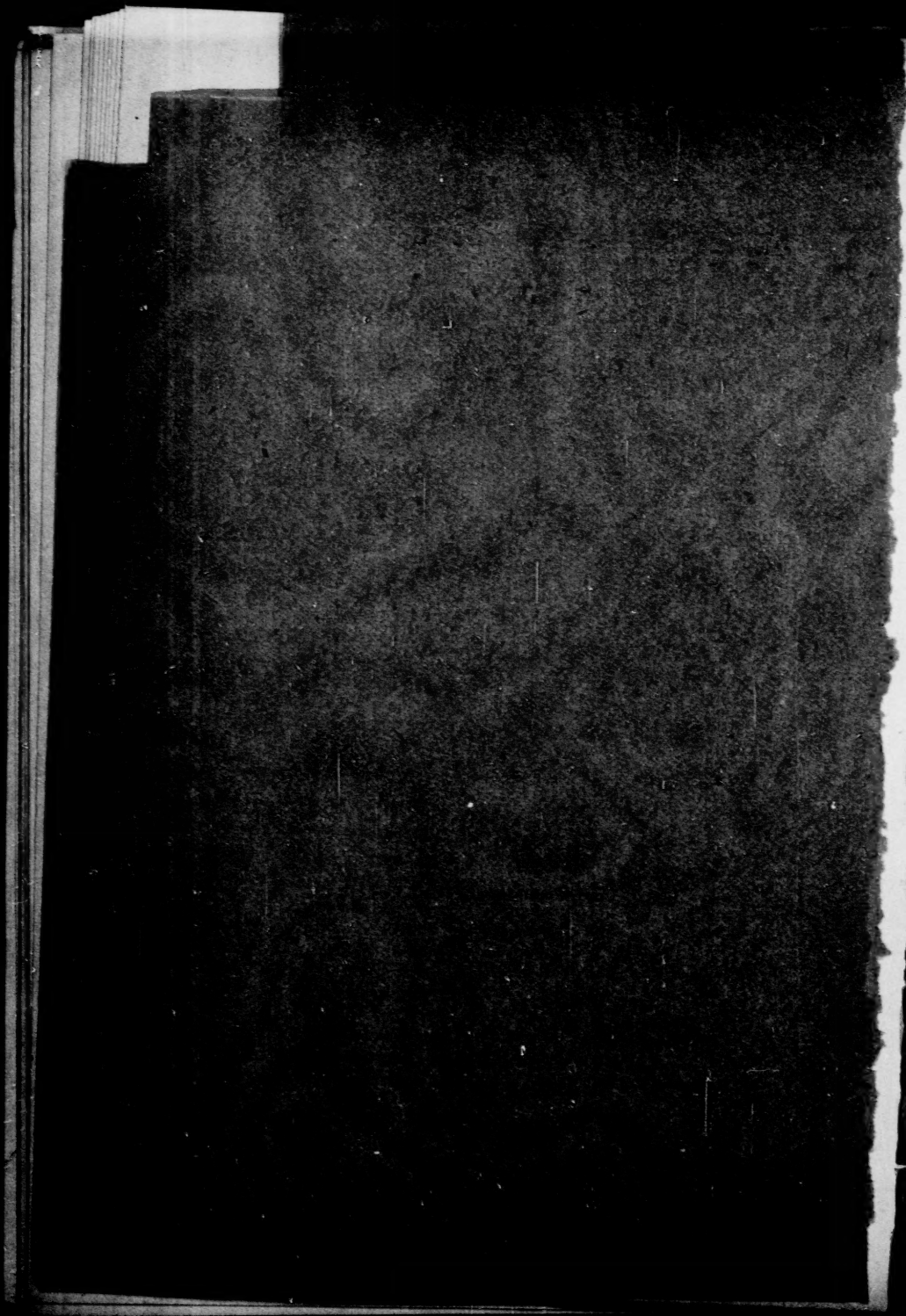
JACOB R. REINHARD ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

G. M. LAMBERTSON,
J. W. DEWEESE,
Solicitors for Appellant.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB



In the Supreme Court of the United States.

OCTOBER TERM, 1896.

JAMES M. DEWEESE, JR., *Appellant,*
v.
JACOB R. REINHARD ET AL., *Appellees.*
No. 151.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

The appellant was complainant in the court below and this appeal is prosecuted to reverse the decree of the court below dismissing the bill for want of equity, and the affirmance thereof by the United States circuit court of appeals for the eighth circuit. The facts of the case are substantially as follows:

1. This suit was begun in the circuit court of the United States for the district of Nebraska on the 8th day of October, 1888, to enjoin the respondent from prosecuting an action in ejectment against the complainant, commenced of the date of November 16, 1885.

Complainant in his bill prays for a decree quieting his title to the northeast quarter of section fourteen (14), township five (5), range three (3) east, situated in Saline county, Nebraska; that respondent be declared to hold the legal title in trust for complainant, and for such other relief as the circumstances in the case may require. Judge Brewer, then United States circuit judge, granted an injunction against the respondents forbidding them to prose-

cute said action at law until the hearing and final determination of this suit.

2. Previous to the 31st day of May, 1883, the land in controversy was wild, unoccupied, unenclosed, and uncultivated, and neither the respondents nor their grantors had ever been in possession of the same. On May 31, 1883, James M. Deweese, Jr., the complainant, being a citizen of the United States, and over twenty-one years of age, made application to the local land office at Beatrice, Nebraska, the jurisdiction of said office extending over the lands in question, to file a homestead entry on the northeast quarter of section 14, town 5 north, of range 3 east of the 6th principal meridian, situated in Saline county, Nebraska, and duly tendered the fees therefor to the local officers as required by law. Said application was by the register of the land office rejected, and the fees for the same, as tendered above, not accepted for the reason, as stated by said officer, that the said land had been selected by the state of Nebraska under the internal improvement act of 1841, which selection had been approved by the land office at Washington. Thereupon the complainant appealed from the said rejection of the said officer to the commissioner of the general land office at Washington; said commissioner approved and affirmed the action of the local land office, and thereupon complainant appealed from said decision to the secretary of the interior, who likewise approved and affirmed the decision of the commissioner of the general land office, and that of the local land office. A transcript of said application, and the opinion of the local land officer, the commissioner, and the secretary of the interior, have been introduced in evidence as part of the complainant's case. (See record, pp. 75–96 inclusive.)

3. The complainant has resided upon said land continuously from the 31st day of May, 1883, up to the present time. He has built a house of the value of $250, a barn of the value of $200, a well and windmill costing $150, planted an orchard of the value of $300, and other trees of the value of $150. He has also broken 120 acres of land and erected fences of the value of $200. At the date when the final proof was tendered the value of the improvements was $600, while their value at the date of the hearing of the suit in the United States circuit court was from $1,600 to $1,800. From the date of filing his application to enter said land as a homestead he has cultivated and improved the same in accordance with the rules and regulations of the general land office of the United States, and the laws of the United States, and has not alienated, mortgaged, bargained, sold, or conveyed the same, or any part thereof, but has settled upon said lands and cultivated the same in good faith for his sole and exclusive use and not for any speculative purposes and

not in the interest of any person. He also claims that on the 6th day of July, 1888, he made a tender of proof by two credible witnesses that he had resided continuously upon and cultivated and improved said lands for the period of more than five years from the date of making said entry and filing said application to enter said lands as a homestead in the manner required by law, before the register and receiver of the United States land office located in Lincoln, Nebraska, the jurisdiction of said office and the register and receiver thereof extending at that time over the lands and premises in question; that he made oath before said register that he had not alienated said land or any part thereof, and that he would bear true allegiance to the government of the United States, and that at said time he tendered the fees required by law therefor; that he entered upon, cultivated, and improved the lands in question as required by the laws of the United States and the rules and regulations of the interior department of the United States; that the land officers of the United States rejected the final proof of the complainant upon the ground that said land had been selected by the state of Nebraska under a grant of land made to said state for internal improvements by act of congress approved September 4, 1841. (See record, pages 67 to 81, inclusive.)

4. Complainant claims that the said lands in question, at the time they were selected by the state of Nebraska under the internal improvement act of 1841, were not subject to sale or private entry; that on the 1st day of March, 1867, by order of James S. Wilson, commissioner of the general land office, the said lands were withdrawn from private entry and rated as double minimum lands, and therefore the selection of said lands by the state of Nebraska and the confirmation of said selection by the secretary of the interior was illegal and void, and being illegal and void, said lands were subject to entry as a homestead by the complainant James M. Deweese, Jr.

Respondents claim that their title rests on the following facts:

1. The one hundred and sixty (160) acres of land mentioned in complainant's petition were selected by the state of Nebraska on March 26, 1868, together with other lands, under the provisions of a grant of 500,000 acres of land made to that state for internal improvements, pursuant to an act of congress approved September 4, 1841.

2. Said selection by the state of Nebraska was approved and affirmed by the secretary of the interior March 29, 1870, in what is known as Clear List Number 7, and a certified copy of the

transcript of such approved list was transmitted to the governor of the state of Nebraska on April 7, 1870. The total amount of land selected by the state of Nebraska under the said internal improvement act, and approved by the secretary of the interior, was and is 500,812 acres.

3. That by virtue of an act of the legislature of the state of Nebraska, approved February 15, 1869, there was donated a certain amount of land belonging to the state to any railroad that would construct a certain number of miles of road within the state, under certain terms and conditions therein specified; that by virtue of the provisions of this act the Midland Pacific Railway Company constructed a line of road in said state, and became thereby entitled to receive the 100,000 acres of land for which said act made provision. That said railway company selected the land in question, among other lands, as a portion of the donation that it was to have in accordance with the terms of said act. The state of Nebraska duly approved said selection, and on the 19th day of July, 1871, executed letters patent to the said Midland Pacific Railway Company, which described and included the land in question. Said deed or patent executed by the state of Nebraska, conveying the said land, recited the fact that the said lands were acquired by and enured to the state under said act of congress of September 4, 1841. There was no warranty of title in said deed of conveyance or patent issued by the state.

4. That afterwards, on or about the 6th day of November, 1871, said Midland Pacific Railway Company conveyed said land, together with other lands, to Joel N. Converse.

5. That on or about the 10th day of December, 1873, Joel N. Converse and Ann E. Converse, his wife, executed and delivered a deed to the above described land, with other lands, to one David S. Gray, as trustee for Joel N. Converse & Co. There is, however, no warranty of title to said land in said deed.

6. That afterwards, on or about the 11th day of November, 1878, said David S. Gray, trustee, conveyed said land to Jacob Reinhard and Frederick Fieser, by special warranty deed. The only covenant of warranty in said deed is as follows: "And that he will forever warrant and defend the same from all encumbrances whatever **occasioned or suffered by him or any person claiming under him or by his or other act of procurement.** The deeds through which the defendants trace their title were placed upon record in Saline county, Nebraska, prior to the 31st day of May, 1883.

7. Since the filing of the bill and the commencement of the actions at law, Frederick Fieser, one of the respondents, has died, and his heirs have been substituted, and this action revived against said heirs.

The averments in the bill that James M. Deweese, Jr., fully complied with the homestead law, is not denied in the answer, but it is averred that one Bernard Castor, not a party to this suit, did not perform the acts alleged in the bill to have been done by James M. Deweese, Jr.

Assignments of Error.

And now comes James M. Deweese, appellant, and says that in the record and proceedings, and in rendering the decree in the circuit court of the United States for the district of Nebraska, in the above entitled cause, there is manifest error in this:

1. That the circuit court for the district of Nebraska erred in dismissing the bill of the complainant, James M. Deweese, Jr., for want of equity.

2. That the United States circuit court of appeals for the eighth circuit erred in affirming the decree of the circuit court of the United States for the district of Nebraska.

3. The United States circuit court of appeals for the eighth circuit erred in holding that the appellant, James M. Deweese, Jr., had no such privity with the title as to prosecute in equity the bill filed.

4. On his appeal to the supreme court of the United States the appellant renews the assignments of error set out in the record, upon which an appeal was allowed from the circuit court of the United States for the district of Nebraska to the United States circuit court of appeals for the eighth circuit, by reason whereof he prays that the decree of the circuit court of the United States for the district of Nebraska, and the affirmance thereof by the United States circuit court of appeals for the eighth circuit, may be reversed.

G. M. LAMBERTSON,
J. W. DEWEESE,
Solicitors for Appellant, James M. Deweese, Jr.

See record, pages 136 and 152.

FIRST POINT.

The complainant having entered said lands as a homestead and having resided upon and cultivated and improved the same for five years, and having in all respects complied with the laws of the United States and with the rules and regulations of the interior department, and

having perfected in all respects his right to said lands, so far as he could, is in a position to challenge the right and title of the respondents, and to pray the court to enter a decree declaring that said respondents hold the title to said premises in trust for the complainant, and decree that they shall convey said premises to the complainant, and in default thereof that a decree be entered quieting the title to said premises in the complainant.

1. The complainant, being in possession of said land, and having done all things required of him under the law to perfect his rights to the homestead, pursuant to sections 2289, 2290, and 2291, Revised Statutes, and the act approved March 3, 1879 (20 Stat. L., 472), may resort to a court of equity to protect his rights in the land.

In *Shepley v. Cowan*, 91 U. S., 330, the court, speaking through Mr. Justice Field, say:

> So in this case Chartrand, the ancestor, by his previous settlement in 1835 upon the premises in controversy, and residence with his family, and application to prove his settlement and enter the land, obtained a better right to the premises, under the law then existing, than that acquired by McPherson by his subsequent state selection in 1849. His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, **if, in point of fact, the reservation had then ceased.**

In *Cunningham v. Ashley*, 14 How., 377, the court say:

> Every legal requisite appears to have been complied with in the act of 1830 to entitle the claimant to a pre-emption. His improvement and occupancy under the law were clearly proved. Indeed, it would seem from the facts that he was entitled to become the purchaser of the land under the law of 1824. But all the facts necessary to establish his right were before the register and receiver upon his second application. His application to make the entry may be said to have been rejected because it was not allowed. But no doubt can exist as to the ground of the rejection. It was not on account of any deficiency in the proof, **but on the ground of the New Madrid locations.**

In *Lytle v. State of Arkansas*, 9 How., 333, the court say:

> It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case the pre-emption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him under the act of 1830, nothing more could be done by him and nothing more could be required of him under that act.

In *Barnard's Heirs v. Ashley's Heirs*, 18 How., 43, the court also say:

> In Lytle's case we declared that the occupant was wrongfully deprived of his right of entry under the pre-emption laws, and the title set up under the selection of the governor of Arkansas was decreed to Cloyes, the claimant, this court holding his claim to the land to have been a legal right, by virtue of the occupancy and cultivation, subject to be defeated only by a failure to perform the conditions of making proof and tendering the purchase money.

The court adds:

> The claim of a pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right. But when covered by the law it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it.

In *Stark v. Baldwin*, 7 Neb., 114, the court say:

> Where the party making the prior settlement has in all respects complied with the law, he is entitled to the lands without regard to anything which the party making a later settlement thereon may have done.

In *Ard v. Brandon*, 156 U. S., 541, the court, speaking by Mr. Justice Brewer, say:

> He had a right to enter the land as a homestead; he pursued the course of procedure prescribed by statute; he made out a formal application for the entry, and tendered the requisite fees, and the application and the fees were rejected by the officer charged with the duty of receiving them—and wrongfully rejected by him. Such wrongful rejection did not operate to de-

prive defendant of his equitable rights, nor did he forfeit or lose those rights because, after this wrongful rejection, he followed the advice of the register and sought in another way to acquire title to the lands. The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application.

"The policy of the federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person." (*Clements v. Warner*, 24 How., 394, 397.)

There can be no question as to the good faith of the defendant. He went upon the land with the view of making it his home. He has occupied it ever since. **He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the government.**

Chism v. Price, 15 S. W. Rep., 883.

Sparks v. Pierce, 115 U. S., 412.

Sioux City Land Co. v. Griffey, 143 U. S., 41.

In *Foss v. Hinkell*, 20 Pacific Rep., 393, the supreme court of California say:

The plaintiffs claimed title under a patent from the United States of the land in suit to the Southern Pacific Railroad Company, dated the 4th of April, 1879, and a deed of the company of the date of the 20th of June, 1887, conveying this land to them. The defendant is a duly qualified pre-emptor, having entered into and held possession of the land in suit since the 22d of April, 1886, and ever since that day has been a *bona fide* pre-emption settler thereon. On the 10th day of June, 1887, he did tender and deposit his declaratory statement in due form for the land in the proper United States land office, and tendered therewith all legal fees for filing the same. The register and receiver refused to file this statement, and on the same day defendant appealed from this refusal to the commissioner of the general land office at Washington, where the appeal is now pending. The de-

fendant pleaded that the land in controversy was never granted to the plaintiff's grantor, the Southern Pacific Railroad Company, because at the date of the location of the route of the Southern Pacific Railroad, or about April 3, 1871, this land was within the exterior limits of the Rancho San Jose, a valid Spanish or Mexican grant, and was thereby reserved from appropriation by the railroad company. By reason of the foregoing facts pleaded, defendant contends that the patent to the railroad company is void.

The court further say on page 395:

It is argued that the defendant should not be allowed to attack the patent of the United States herein, because he is not in privity with the United States. The settlement by the defendant as a pre-emptor on the land in suit was, when made, in compliance with the laws of the United States. And when this land, being a part of the Rancho San Jose, as granted by the Mexican government, was excluded from it by a lawful survey, it became subject to settlement and pre-emption. **Defendant was then lawfully in possession under the laws of the United States, and being so then in possession he was in privity with the United States, the grantor in the patent.** He entered and remained in possession under the grantor by its permission and authority, and the United States had no power to turn him out of possession. * * *

The court on page 394 say:

If the land in suit here was, when the grant to the railroad company, under the act of congress of July 22, 1866, and March 3, 1871, took effect, within the limits of the Rancho San Jose, and the grant of this rancho was then *sub judice*, the patent under which plaintiffs herein claim was void from the beginning. This conclusion is sustained by the judgments of the court in *Carr v. Quigley*, 57 Cal., 395, and *McLaughlin v. Heid*, 63 Cal., 210. The case first cited was decided January, 1881, and the last cited case in February, 1883. The supreme court of the United States has recently (on November 21st, 1887) decided the same way in *Doolan v. Carr*, 125 U. S., 618.

Kile v. Tubbs, 23 Cal., 431.

In *Doolan v. Carr*, 125 U. S., 618, cited above in the California case, the facts were as follows, as stated in the dissenting opinion of Chief Justice Fuller:

> The land was patented to the Central Pacific Railroad Company February 28, 1874, and the railroad company conveyed to Carr, the plaintiff below, June 10, 1874. No attempt has been made by the United States, so far as this record discloses, to annul the patent. On the 10th of November, 1882, Doolan and McCue each entered on 160 acres of land under a claim of pre-emption and settlement. Each of them made and subscribed a declaratory statement of his intention to claim and pre-empt the land on which he settled, under the laws of the United States, and presented it to the register of the proper land office, but he refused to receive it on the ground of the patent to the railroad company. This is all the claim of title which they had.

In the dissenting opinion of Chief Justice Waite it was contended that the defendant was not in a position to attack the patent, but all the other members of the court, speaking through Mr. Justice Miller, obviously thought otherwise.

It will be seen that the facts in these two cases were very similar to the facts in the case at bar, and it appears that in each case the claim of the pre-emptor, who settled upon the land, originated after the land had been patented to the railroad company. And it also appears that the pre-emptor had simply filed his declaratory statement with the local land officers, and tendered his fees; the same had been refused, and he had appealed to the commissioner of the general land office, which was the exact proceeding adopted in this suit.

Nevertheless the supreme court of California, as well as the supreme court of the United States, held that the pre-emptor was in such privity with the United States that he could attack the patent as being void even in a suit in ejectment. In each case the patent was held to be void.

In *Carroll v. Patrick*, 23 Neb., 834, the court say:

> Where the party entering land has complied with the law in all respects to entitle him to a patent therefor, he is the owner of such land, and until the patent issues the title is held by the United States merely as a trust for his use.

In *Wirth v. Branson*, 98 U. S., 118, the court holds:

> A party who has complied with the terms and conditions which entitle him to a patent for a particular tract of public land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof. While his entry or location remains in full force and effect, his rights thereunder will not be defeated by the issue of a patent to another party for the same tract.
>
> *Red River & L. W. R. Co. v. Stone*, 20 N. W., 229.
>
> *B., K. & S. W. R. Co. v. Johnson*, 38 Kansas, 142.
>
> *St. Paul & S. C. R. Co. v. Ward*, 40 N. W., 401.

2. The general doctrine is unquestioned that a court of equity will impeach a patent issued to one person that ought to go to another, and which would have been delivered to another except for the erroneous act of the land department, or declares the patentee to hold the fee in trust for the real owner.

The correct rule is stated by the supreme court in *Bohall v. Dilla*, 114 U. S., 50. The court, speaking by Mr. Justice Field, say:

> To charge the holder of the legal title to land under a patent of the United States as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused him.

In *Steele v. Smelting Company*, 106 U. S., 447, the court holds:

> A party who claims to be aggrieved by such issue, although he cannot have the patent vacated or limited in its operation where it comes collaterally in question in an action for the recovery of possession, may obtain relief in a court of chancery, if he has such an equitable right as will estop the patentee or those claiming under him from asserting the legal title to the land.

In *Smelting Company v. Kemp*, 104 U. S., 636, the court hold:

> A patent, duly signed, counter-signed, and sealed, for public lands which, at the time it was issued, the land department had, under the statute, authority to convey, cannot be collaterally im-

peached in an action at law; and the finding of the department touching the existence of certain facts, or the performance of certain antecedent acts, upon which the lawful exercise of that authority may in a particular case depend, cannot in a court of law be questioned.

If in the issuing of a patent the officers of that department take mistaken views of the law, or draw erroneous conclusions from the evidence, or act from either imperfect views of duty, or corrupt motives, the party aggrieved cannot set up such matters in a court of law to defeat the patent. **He must resort to a court of equity, where he can obtain relief, if his rights are injuriously affected by the existence of the patent, and he possesses such equities as will control the legal title vested in the patentee. A stranger to the title cannot complain of the act of the government in regard thereto.**

Van Wyck v. Knevals, 106 U. S., 360.

Frazier v. O'Connor, 115 U. S., 102.

Monroe Cattle Co. v. Becker, 147 U. S., 57.

The procedure herein adopted is authorized by section 57 of the Code of Civil Procedure of Nebraska, p. 652, Compiled Statutes, which is as follows:

> That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate.

See *Holland v. Challen*, 110 U. S., 15, which holds that the courts of equity will enforce statutory rights of action conferred by above section.

SECOND POINT.

Further discussion of the question as to whether the appellant is in privity with the United States.

1. Counsel for appellee contend, and the court of appeals decided,

that appellant is not in privity with the United States, because the title has not been recognized. Putting it in a strong way, appellee insists that there can be no privity resting on a repudiated claim of title. It is well not to confound the land officers of the government with the United States. It is true that the **land officers** have refused to allow appellant to file on the land, and have rejected the proof tendered; but our claim to be in privity with the United States does not rest upon the action of the land department but upon the **law itself.** The United States, by the homestead act, granted to certain of its citizens a quarter section of land, or less, on compliance with the terms of the gift. What the law gave, the land officers cannot take away. If so, they are superior to the law. Hence appellant's right to connect himself with the common source of title does not depend upon the acts of the land officers, but upon appellant's observance of the homestead laws. If he obeyed the law, then the land is earned, and the wrongful action of the local land officers cannot thwart the right acquired. If this court holds that appellant did all that the law required of him, then the mere non-acceptance of the application and proof would not defeat the right. If the contrary is true, then the register and receiver, by refusing to receive the application to enter land, might defeat the operation of the homestead act. The action of the land officers is entitled to respect, but is not final. It is subject to review by the courts.

Let us restate in detail just what was done by appellant to perfect his right to the land.

Section 2289, R. S., provides:

> Every person * * * who has arrived at the age of twenty-one years, and is a citizen of the United States, * * shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, * * * which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre, or eighty acres or less of such unappropriated lands at two dollars and fifty cents per acre. * *

By the act of March 3, 1879, 20 U. S. Stats., 472, it was provided that—

> The even sections within the limits of any grant of public lands to any railroad company * * * shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler.

Section 2292, R. S., provides that proof of residence, occupation, or cultivation, the affidavit of non-alienation, and the oath of the allegiance required to be made by this section, may be made before the judge or, in his absence, before the clerk of any court of record in the county and state, or district and territory, in which the land is situated.

Now, the appellant was a citizen of the United States twenty-one years of age. The lands were unappropriated and part of even sections within the limits of the land grant of the B. & M. R. R. Co. Appellant made the affidavit before the register and receiver, as provided by section 2290. The fees required by law were tendered. The application was rejected, but the papers were retained by the local land officers, and on appeal being taken were transmitted to the commissioner of the general land office. (See testimony of Hiram W. Parker, then register of the land office, record 29.)

On May 22, 1888, appellant gave notice to the local land officers at Lincoln, Nebraska, of his intention to make final proof to establish his claim to the land above described, and thereupon the register gave the following notice:

> LAND OFFICE AT LINCOLN, NEBRASKA, May 21, 1888.
> Notice of the above application will be published in the *Opposition*, printed at Wilber, Nebraska, which I hereby designate as a newspaper published near the land described in said application. T. B. DAVIS, *Register*.
>
> See record, page 62.

On May 21, 1888, T. B. Davis, register of the land office, published the following notice:

LAND OFFICE AT LINCOLN, NEBRASKA, May 21, 1888.

Notice is hereby given that the **following named settler** has filed notice of his intention to make final proof in support of his claim and that said proof will be made before the register and receiver at Lincoln, Nebraska, on July 6, 1888, viz.; Hd., James M. Deweese, Jr., for the northeast quarter of section fourteen, township five north, of range three east. He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz.: Joseph L. Hubbell, of Swanton, Saline county, Nebraska; Crawford Young, of Swanton, Saline county, Nebraska; Theodore Turney, of Swanton, Saline county, Nebraska; Charles E. Lewis, of Swanton, Saline county, Nebraska.

The register also made the following certificate:

Certificate as to Posting Notice.

THE LAND OFFICE AT LINCOLN, NEBRASKA, July 6, 1888.

I, T. B. Davis, register, do hereby certify that the notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for the period of thirty days. I have posted said notice on the 21st day of May, 1888.

T. B. DAVIS, *Register.*

See record, pages 62 and 63.

Then follows the evidence of final proof. (See pages —.)

The register at the close of the proof makes final certificate:

I hereby certify **that each question in the foregoing deposition was orally propounded to the said James M. Deweese, Jr., and the foregoing answers severally given by him thereto before he signed the same,** and after being sworn according to law, the said James M. Deweese, personally to me known or satisfactorily identified by J. W. Deweese as the person he represents himself to be in making this proof, and I called his attention to the laws and penalties against false swearing, and that the foregoing deposition was sworn to and subscribed before me this 6th day of July, A. D. 1888.

T. B. DAVIS, *Register.*

See record, page 74.

On the same day the register of the land office at Lincoln, Nebraska, endorsed on the proof as follows:

UNITED STATES LAND OFFICE,
LINCOLN, NEBRASKA, July 6, 1888.

The foregoing proof is rejected on account of the state of Nebraska selecting March 26th, 1868, list approved 7–29–1870, No. 7. Application to enter the land rejected January 21st, 1884, shown by the records of this office.

T. B. DAVIS, *Register*.

See record, page 62.

It appears, then, that appellant observed the law in every respect; that on May 31, 1883, he made the affidavit required to enter the land, which was **subscribed and sworn to before H. W. Parker, register of the land office**; that the affidavit was retained by the local officers and went to the general land office; that after remaining five years and more on the land, notice was given by the appellant to the local land officers, of appellant's intention to make final proof. The register received the notice and acted upon and designated the paper in which publication should be made; then prepared and inserted the proper notice, in which he described the appellant as "the following named settler" and fixed the time for hearing the proof. On the date fixed the proof was tendered, and the register certifies that he propounded the interrogatories, received the answers, and called the attention of appellant and his witnesses to the penalties against false swearing. The register also swore the witnesses and the claimants to the proofs. The rejection of the original entry and the proofs was not based upon their **insufficiency or on the ground that appellant had not observed the law and earned the land, but solely because the land had already been appropriated.** The land department in effect say we have certified this land to the state of Nebraska wrongfully, and thereby tied our hands; the court alone can give you relief. When we come to the court we are told that the action of the land department has also tied the hands of the court. Is it not true that the land department, in allowing the affidavits to be made before them, in retaining the affidavit, in publishing notice when the final proof would be taken, in swearing and interro-

gating the witnesses, in receiving final proof, recognized the settlement, claim, or right of appellee, so that he is in a position to challenge the action of the secretary of the interior in confirming the selection by the state of Nebraska of this land?

2. A distinction is sought to be taken between appellant's right to attack the patent in the ejectment suit and his privilege to assail it in equity. It is contended that in the law action we might have sufficient privity to defend against it, while in equity such privity would be wanting. I take the rule to be that if appellant has so connected himself with the source of title as to challenge an invalid patent in a court of law, he can question its validity in any court. **The very object of filing the bill was to enable appellant to avail himself of all his defenses and render them more effective.**

At law appellant must show either that he had the legal estate or that appellee did not possess it. In this court it is only necessary to prove, in order to obtain part of the relief prayed for, that appellant is equitably entitled to the land. If it is clear that appellant has any right in the land, it is equally certain that appellee has none. Appellee has the legal title, or none whatever. Appellant does not claim that the appellee's title is weaker than his, but that appellee has, in a legal sense, no title. It is not a case where the equities are to be balanced to find which is the stronger title, but one where appellant has **some right** in the land and appellee none. It is for the court to say whether it will grant complete relief by requiring appellee to convey his paper title.

The court in numerous cases, after declaring a patent invalid, or void, has decreed such relief because the apparent or *prima facie* title is outstanding. In other cases it has declared the equity of the complainant, the invalidity of the patent, and enjoined the assertion of any claim to the property under the patent.

Independent of the general rule in equity governing such cases

appellant has brought his case within section 57 of the Code of Civil Procedure quoted *supra*. That section gives persons claiming title, whether in possession or not, a right of action against any person who claims an adverse interest therein for the purpose of determining such estate or interest and quieting the title to said real estate.

3. It is further contended that the rule that he who is first in time is first in right, applies; that the younger title cannot control and subvert the elder.

It is believed that the rule invoked only applies to a case where both parties have an equal right to acquire the land, as, for instance, if there were two homestead settlements and filings on the land in question, then he who had the earliest filing, having in other respects observed the law, would be entitled to the patent. But that rule has no application to a case of this character, where the state of Nebraska could not lawfully take lands of the kind in controversy. Appellees cannot be said to have a prior right where the law declares they can have no right.

In *Hoofnagle v. Anderson*, 7 Wheat., 214, the contest was between holders of land warrants who, in the language of Chief Justice Marshall, "were equally capable of appropriating the land." In such a case the one making the first entry acquired the land. There can be no doubt of the correctness of the opinion announced by the court upon the facts stated: "That a patent appropriates the land it covers, and that land, being no longer vacant, is no longer subject to location."

In *Foss v. Hinkle* and *Doolan v. Carr, supra*, and in *Patterson v. Tatum*, 3 Sawyer, 164, the later entry prevailed and controlled the title.

I apprehend that this question cannot be considered of controlling importance unless the court is in doubt as to its power to declare appellee to hold the land in trust for the holder of the junior title.

As the trust to be created is a pure creation of the court, it would seem that the expansive powers of a court of equity would be equal to the declaration that appellee holds the title in trust for James M. Deweese, Jr. The court should decree the title to go where it would otherwise go except for the invalid title.

The trusts that have been declared against patentees, and in favor of the person entitled to the land, are arbitrary creations, not within the contemplation of the government, and frequently against its plain intent. A trust is engrafted on a patent simply from necessity, and the relief granted arises out of the importance of granting full, complete, and adequate relief. Applying this principle, a court of equity, if it gives appellant a decree, ought not to send him away with half a loaf, but should give him complete relief, that he need not make any further application to the United States to perfect his title.

THIRD POINT.

It is not necessary that the United States should first file a bill and obtain a decree annulling the patent issued before the complainant can invoke the equitable jurisdiction of the court.

These lands, as we will show, have, either through mistake, inadvertence, or erroneous construction of law, been patented to the wrong person. The United States held these lands in trust for actual settlers. In violation of that trust and of the statute they donated them to the state of Nebraska, from which state, by various mesne conveyances, respondents trace title. Except for this act the patent must issue to complainant. Why should the United States be dragged into this litigation? It has no interest in it; it owes no public duty to any one but complainant; if it obtained title again it must pass it over immediately to complainant. If suit were commenced it must be in the interest of the complainant and at his request. The government

would have no inducement to sue other than to satisfy complainant's claim. Pursuant to the laws of congress these lands were set aside and reserved to the actual settlers. Either by mistake of law or fact the United States donated them to the state of Nebraska. Notwithstanding this void act, the actual settler goes onto the land and cultivates and improves it as his home, within both the letter and spirit of the law. He attempts to make his final proof, and it is rejected, not because the proof is insufficient; not because of any failure to comply with the law or regulations of the land department; not because the lands were not reserved for homestead entry—because the department decides the contrary—but because, by the mistaken or illegal act of the land department the title is outstanding in a donee.

Must the rightful occupant first require the government to secure the revocation of the patent or cannot he deal directly with the holder of the "dry legal title"?

The government may undoubtedly intervene in behalf of the actual settler. But is it necessary? Suppose the court decides that the suit must be commenced by the United States, and we ask the attorney general to file the bill, and he refuses; then the illegal act of the land officers cannot be challenged, and we have a wrong without a remedy.

On the other hand, suppose the attorney general institutes suit. It is in reality a suit brought by the settler in the name of his next friend, the United States. Why do a vain thing? Why resort to circumlocution when the real parties in interest can settle it between themselves? We believe that the decisions of the supreme court sustain our contention.

In *Curtner v. U. S.*, 149 U. S., 673, the court say:

> In the case before us the state of California and the grantees claimed the title from the United States, as did the railroad and its grantees. Either the grantees of the state or the grantees of the railroad company had, when the bill was filed, the title to the land. No fraud or imposition or wrong as against the United

States was charged, and no case made in which the United States sought relief for themselves. **Nor was the case one of mistake in the sense that the action of the United States and of the state would not have been what it was but for ignorance of particular facts or of the law, for the state acquired the legal title by the listings, and that legal title passed to its grantees, and if the railroad company and its grantees acquired an equitable title, no reason is perceived why the real parties in interest could not litigate their claims between each other.** And this was equally true if the state selections and the listings were wholly void. No wrong was chargeable against the state, and if the state and the railroad each claimed the land in good faith upon mere questions of law and fact, without any element of wrong or fraud, it does not appear that the bill should be regarded as accomplishing anything more than raising a controversy between the parties actually in interest.

Rector v. Given, 111 U. S., 291.

U. S. v. Minor, 114 U. S., 233.

U. S. v. San Jacinto Tin Co., 125 U. S., 286.

These cases in effect hold that where the action is in the interest of a private individual, the suit should not be brought in the name of the United States; that being in the nature of a private controversy, it can be fully adjudicated without the intervention or presence of the United States as a party to the suit. In this case the title stands in the name of the grantees of the state of Nebraska, to whom patent was issued by the United States. The complainant has fully complied with the homestead laws of the United States, and has perfected his title so far as it was possible for him to do so, and the United States having recognized his right to the land in question except for the reason that the title is outstanding in another person, it would seem unnecessary for the government to intervene, as a proper adjudication can be made between the parties who hold respectively the legal and equitable title. Such we take to be the doctrine announced by the supreme court in the cases cited.

In any event we contend that the United States would not be

required to commence an action to set aside the title, for the reason that by section 2449 of the Revised Statutes of the United States it is provided that

> Where lands embraced in such lists are not of the character embraced by such act of congress, and were not intended to be granted thereby, said list, so far as those lands are concerned, shall be perfectly null and void, **and no right, title, or interest shall be conveyed thereby.**

If, in the language of the statute, "no right, title, or interest" was conveyed to the state of Nebraska, why should the United States institute a suit to re-acquire a title which it already holds?

FOURTH POINT.

The lands in controversy were double minimum lands, subject to homestead entry, and pre-emption, only, at $2.50 per acre.

1. Said tract of land is within the twenty (20) mile limit of the land grant to the Burlington & Missouri River Railroad Company. The grant to the Burlington & Missouri River Railroad Company by the act of congress of July 2, 1864, was of ten sections of land for every mile on each side of the line of its road then located, such sections to be designated by odd numbers, and the land to be taken was, at the time the land was definitely fixed, land which had not been sold, reserved, or otherwise disposed of by the United States, and to which the pre-emption or homestead claims had not been attached.

It appears from the map in evidence, prepared by direction of the commissioner of the general land office and duly certified by the commissioner of the general land office, that the land in question was an even numbered section within the limits of the land grant to the Burlington & Missouri River Railroad Company. (See record, p. 96.) It is shown by the testimony that the odd sections, both east and west of the section in question, were selected by the Burlington & Missouri

River Railroad Company, and patented to that company by the United States. (Record, pp. 43, 120.) It also appears from the decision of the commissioner of the general land office and the secretary of the interior, and they so found the fact to be, that section 14–5–3 east of the 6th P. M. was within the limits of said land grant. (Record, p. 87.)

2. It also appears that James S. Wilson, commissioner of the general land office, by a letter of March 1, 1867, directed to the register and receiver of the land office at Brownville, Nebraska, made the following order:

> The secretary of the interior, having under date of December 17, 1866, and December 25, 1867, directed a restoration of land withdrawn for the Burlington & Missouri River railroad outside of twenty miles from the line of said road, you are hereby instructed to restore the odd sections thus withdrawn to the condition in which they were prior to the date of withdrawal. The lands to be restored are the odd sections which lie north of the line dividing sections four (4) and five (5) and south of the twenty-mile limit of said road, as shown on the diagram herewith.
>
> The odd sections within the twenty-mile limit are still reserved and the even sections within that limit are increased to $2.50 per acre, and hereafter will only be subject to pre-emption and homestead at that price, except where pre-emption and homestead rights may have accrued prior to the receipt of these instructions by you. (See record, p. 121.)

(See letter of Acting Commissioner Harrison, of general land office, of date of June 8, 1883, written to Mr. Deweese. Record, p. 75.)

Commissioner McFarland, of the general land office, in passing upon the appeal from the local land officers, on July 7, 1882, states the facts as follows:

> It is further shown that said section 14, town 5 north, of range 3 east, was on the date mentioned, and now is, an even section within the twenty-mile limit of the grant to the Burlington & Missouri River Railroad Company by act of congress approved July 2, 1862; referring to which the honorable secretary of the interior, in his decision of July 5, 1870, states as follows: "I have

carefully considered your letter of the 28th ult., and the papers therewith transmitted in relation to the claims of the state of Nebraska under the internal improvement grant of September 4, 1841, to the parcels of land situated in the alternate even numbered sections lying within the limits of the grant made by act of July 2, 1864, to the Burlington & Missouri River Railroad Company. **In addition to the views I have presented I remark that such sections are rated at $2.50 per acre, and by the act of March 6, 1868, which was in force when most of the lands were selected by the state, were subject to entry only under the homestead and pre-emption law. I subscribe with you in the opinion that such sections or parts of sections were not selected pursuant to law, and cannot be certified to the state." The principle involved in the above decision has been universally held by this office to apply to all government minimum lands except where otherwise provided by act of congress; hence it must be concluded that the selection, approval, and certification of said tract to the state was erroneous.** (See record, p. 87.)

The commissioner then proceeds to say that he cannot recall the patent already issued. It therefore appears that said section was within the limits of the Burlington & Missouri River Railroad Company land grant and was not subject to sale or private entry; that the price had been increased to $2.50 an acre and the land had been declared subject to entry under the pre-emption and homestead laws of the United States.

2. Counsel for appellee further insist that there is no limit to the Burlington & Missouri River Railroad Company grant.

While we agree that under the decision in *United States v. Burlington & Missouri R. R. Co.*, 98 U. S. 334, there could be no arbitrary limit fixed that would deprive the road of its ten alternate sections per mile on each side of the road, yet, in a general sense, as was said by the supreme court in *Woods v. Railroad Co.*, 104 U. S., 331, the road is limited in its selections to the land adjacent to its line. If within the twenty-mile limit fixed by the secretary of the interior the road's

quota of lands granted could be selected, then the road was limited to those lands, otherwise not. Hence, in this sense the grant had lateral limits.

It appears from the proof that for the purposes of withdrawing the odd sections from pre-emption and homestead entry, and raising the even sections to $2.50 per acre, the land department fixed a limit and penciled it down on its plats and maps, and sent diagrams and plats showing the limits of this grant to the register and receiver at Brownville, Nebraska. (See Exhibit D½, record, p. 97.)

In order to withdraw the odd sections and rerate the even sections, the secretary of the interior was compelled to fix some limit, otherwise the odd sections on either side of the line for fifty miles might have been withdrawn from pre-emption and homestead entry. The law not only gave him the right, but made it his duty, to withdraw the odd sections within the limit of land grants and raise the value of the even sections to $2.50 per acre. He therefore established a limit and increased the value of the even sections to $2.50 per acre. Section 14 was within the limit and became thereby double minimum lands.

In *Hamblin v. Western Land Co.*, 147 U. S., 531, the court say:

> A reservation of public land from entry, made by the department of the interior as coming within the limits of a railroad grant, operates to withdraw the land from homestead entries, even if found afterwards not to come within such limits.
>
> *Wolsey v. Chapman*, 101 U. S., 167.
>
> *Bullard v. Des Moines & F. D. Railroad*, 122 U. S., 167.
>
> *Spencer v. McDougal*, 159 U. S., 62.

It makes no difference whether the limits of the land grant were rightfully fixed or not; **it is certain that they were established and the price of these lands was raised to $2.50 per acre.** The land department had the right to fix the minimum price for lands,

independent of the right to determine the boundary of a railroad land grant.

It is well to keep in mind that the question here is not what were the proper limits of the grant to the Burlington & Missouri River Railroad Company, but whether the land in controversy was double minimum land. If section 14 was increased in price to $2.50 per acre, and the secretary of the interior or the commissioner of the general land office had the right to fix the price, it makes no difference what the limits of the land grant were.

We cannot see how the contention of the appellee is helped by showing that the land grant had no lateral limits. If true, that fact helps our position, for the grant may then extend beyond the twenty-mile limit. These lands, under that construction of the law, would be reserved for homestead entry, although more than twenty miles from the road.

As to what are double minimum lands, see

R. S., 2364.
13 U. S. Statutes, 374.
Act of March 6th, 1868 (quoted *supra*).
Sec. 2357, R. S.
Act of March 3, 1879, 20 U. S. Statutes, 472.
5th clause of 12 U. S. Statutes, 505.
Act of March 3, 1853, 10 U. S. Statutes, 244.
U. S. v. Healy, 160 U. S., 139, and Statutes cited.

FIFTH POINT.

These lands being part of an even numbered section within the limits of the Burlington & Missouri River Railroad Company's land grant, were not subject to selec-

tion by the state of Nebraska, or approval and certification by the secretary of the interior under the internal improvement act of September 4, 1841.

The act of September 4, 1841, granting 500,000 acres to each state for the purpose of internal improvement, so far as it bears upon the question under consideration, is as follows:

> There is granted for the purposes of internal improvement, to each new state hereafter admitted into the Union, upon such admission, so much land as, including the quantity that was granted to such state before its admission and while under a territorial government, will make five hundred thousand acres.
>
> The selection of lands, granted in the preceding section, shall be made within the limits of each state so admitted into the Union in such manner as the legislatures thereof, respectively, may direct; and such lands shall be located in parcels conformably to section divisions and subdivisions of not less than three hundred and twenty acres in any one location, on any public land not reserved from sale by law of congress or by proclamation of the president. The locations may be made at any time after the public lands in any such new states have been surveyed according to law.
>
> U. S. Stat., sec. 8, vol. 5, page 455.
>
> See sections 2378 and 2379, U. S. Revised Statutes.

This act granted only such lands as were subject to private entry. Sections 2354–2357, Revised Statutes, define what lands are subject to private entry, or, in other words, what lands are subject to private sale. Section 2357 provides that "all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sale, shall be subject to be sold at private sale by entry at the land office, at $1.25 an acre, to be paid at the time of making such entry."

Section 2379, in defining the nature of the land granted under the internal improvement act, limits the right of the state to taking only such lands as are not reserved from sale by law of congress or by

proclamation of the president. Double minimum lands, by the proviso of section 2357, are reserved lands. I quote the proviso:

> *Provided*, That the price to be paid for alternate reserve lands along the line of railroads within the limits granted by any act of congress shall be $2.50 per acre.

By letter of March 1, 1867 (record, p. 138), the even sections along the line of the Burlington & Missouri River railroad were increased in price to $2.50 per acre. This letter is referred to in the letter of L. Harrison, acting commissioner, under date of June 8, 1883.

The letter of March 1, 1867, addressed to the local officers at Brownville by Commissioner Wilson, of date of March 1, 1869, contains the following clause:

> The odd sections within the twenty-mile limit are still reserved, and the even sections within that limit are increased to $2.50 per acre, and hereafter will only be subject to pre-emption and homestead at that price, except where inceptive rights under the pre-emption law may have accrued prior to the receipt of these instructions by you. The register will at once proceed to lay down in pencil on township plat the twenty-mile limit of this road, and make the proper notes thereon, showing the odd sections to be reserved and the even sections to be $2.50 per acre. (Record, p. 138.)

Commissioner McFarland, in his letter to the register and recorder at Beatrice, of date of July 7, 1883, says:

> I concur with you in the opinion that such sections or parts of sections were not selected pursuant to law, and cannot be certified to the state.

Commissioner McFarland further says:

> The principle involved in the above decision has been uniformly held in this office to apply to all double minimum lands, except when otherwise provided by act of congress. Hence it must be conceded that the selection, approval, and confirmation of such land to the state was erroneous. (See record, p. 96.)

The act approved March, 6, 1868, referred to above, is as follows:

> That nothing in the act approved July 1, 1862, entitled "An

act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," and the acts amendatory thereof, shall be held to authorize the withdrawal or exclusion from settlement and entry under the provisions of the pre-emption or homestead laws the even numbered sections along the routes of the several roads therein mentioned, which have been or may be hereafter located; *Provided*, That such sections shall be rated at two dollars and fifty cents per acre and subject only to entry under those laws, and the secretary of the interior be, and is hereby, authorized and directed to restore to homestead settlement, pre-emption, or entry according to existing laws, all the even numbered sections of land belonging to the government and now withdrawn from market on both sides of the Pacific railroad and branches, whenever said branches have been definitely located.

These lands were selected by the state of Nebraska March 26, 1868, and certified March 29, 1870. By examining sections 18, 19, and 20 of an act of congress found in U. S. Stat., vol. 13, page 556, it will be seen that the Burlington & Missouri River Railroad Company is one of the branches of the Union Pacific referred to in the act just quoted.

In *Stalnaker v. Morrison*, 6 Neb., 363, the court hold:

> Even numbered sections along the line of the Union Pacific R. R. and its branches may be settled upon and entered under the provisions of the pre-emption and homestead laws, but are not subject to private entry.
>
> The B. & M. extension is one of the branches of the Union Pacific R. R., and the lands within the limits of the grant to that corporation are not subject to private entry.
>
> When lands have been offered at public sale, and thereby become subject to private entry, if they are afterwards included within the boundaries of a grant to a railroad company, and are thereby withdrawn from private entry, and subject to settlement and entry under the pre-emption and homestead laws exclusively, they are to be treated in all respects like unoffered land.

In *Stark v. Baldwin*, 7 Neb., 114, the court say:

> Lands within the B. & M. railroad grant are not subject to private entry, and in regard to settlement and entry under the homestead and pre emption laws are to be regarded as unoffered lands.

SIXTH POINT.

The selection of the lands in controversy by the state of Nebraska, and the approval and certification of the same by the secretary of the interior, is void.

By the act of August 3, 1854 (U. S. Stat., vol. 10, p. 346), as well as by act of March 3, 1875 (vol. 18, p. 475), the substance of which has been incorporated into section 2449 of the Revised Statutes of the United States, it is provided:

> That in all cases where lands have been or may be hereafter granted by any law of congress to any one of the several states and territories, and where said law does not convey the fee-simple title of such lands or require patents to be issued therefor, the list of such lands as have been or may hereafter be certified by the commissioner of the general land office, under the seal of his office, either as originals or as copies of the originals or records, shall be regarded as conveying the fee-simple of all the lands embraced in such list that are of the character contemplated by such act of congress, and intended to be granted thereby. **But where lands embraced in such lists are not of the character embraced by such act of congress and were not intended to be granted thereby, said lists, so far as those lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.**

In *United States v. Missouri, Kansas & Texas Ry. Co.*, 141 U. S., 371, speaking to a similar question, the supreme court say:

> As the natural result of the construction of the road aided would be an increase in the market values of the reserved sections remaining to the United States, within the place limits of the Leavenworth road, those sections were not left to be disposed of under the general laws relating to the public domain, but in order that the government might get the benefit of such increased value, and thereby reimburse itself to some extent for the land granted—the title for which vested in the state or the company upon the definite location of the line of the road, and, by relation, as of the date of the grant—the act of 1863 made special provisions in reference to those reserved sections, and thereby, and for the accomplishment of particular purposes expressly de-

cleared, segregated them from the public body of the lands of the United States. **Being thus devoted to specified objects, they were reserved to the United States, and could not be selected by the state either under the act of 1865, or that of 1866, for other and different objects. They could not be selected as indemnity lands under the act of 1863, because the lands to be selected under that act were restricted to odd numbered sections**; nor under the act of 1866, because at the date of its passage they were reserved for the special purposes indicated in the second section of the act of 1863.

It follows that the Missouri, Kansas & Texas Railroad Company was not entitled, in virtue of the act of 1866, to have indemnity lands from the even numbered sections within the place limits of the Leavenworth road. The issuing of letters patent for such lands was unauthorized by law.

A similar question arose in *Mullan v. United States*, 118 U. S., 278, only the action was commenced by the United States. The court construes the act of September 4, 1841:

At the time the selection was actually made, therefore, it cannot be doubted that the land was mineral land, both in law and in fact, within the meaning of the act under which the state and those who purchased from the state undertook to acquire title, and we agree with the circuit court in opinion that the rights of the parties are to be determined by the law as it stood then. **Such being the case, we have no hesitation in deciding that the land was not open to the state for selection.** * * * It is no doubt true that the actual character of the lands was as well known at the department of the interior as it was anywhere else, and that the secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853, and they were open to selection by the state; but this does not alter the case. **The list was certified without authority of law, and, therefore, by a mistake, against which relief in equity may be afforded.** As was said in *United States v. Stone*, 2 Wall., 525, 535: **"The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority.** But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of

a court." This language is equally applicable to the present case, and its correctness has been often recognized. (*Moore v. Robbins*, 97 U. S., 530, 533; *United States v. Schurz*, 102 U. S., 378, 396; *Steel v. Smelting Co.*, 106 U. S., 447, 454; *Moffat v. United States*, 112 U. S., 24.)

See *United States v. Mullan*, 10 Fed. Rep., 785.

Lake Superior Ship Canal Railway & Iron Co. v. Cunningham, 44 Fed. Rep., 831.

St. Paul R. R. Co. v. Winona R. R., 112 U. S., 720.

Stoddard v. Chambers, 2 How., 284.

Leavenworth R. R. Co. v. U. S., 92 U. S., 741.

The character of the grants under the internal improvement act of September 5, 1841, their validity, the nature of the evidence required to show their invalidity, and the power of the commissioner to withdraw lands from sale and entry, is set forth in the clearest language in the opinion of Mr. Justice Field in *Patterson v. Tatum*, 3 Sawyer, 164.

This was an action for the possession of certain real property. The plaintiff claimed title to the premises under a patent of the state of California bearing date February 14, 1871, issued upon the selection of the premises as part of the five hundred thousand acres donated by the act of congress of September 4, 1841. The selection was made by the locating agent of the state on the 1st day of May, 1868. A list of sections was on that day filed in the land office. This list was approved by the commissioner of the general land office on the 16th of October, 1871, and by the secretary of the interior on the 18th of the same month.

Mr. Justice Field, in the opinion, says:

> The grant to the state by the act of congress of September 4, 1841, is not of any specific land, but of a specific quantity to be selected under the direction of her legislature, in parcels conformably to the lines of the public surveys, out of any public land, excepting such as was then reserved, or might thereafter at

the date of the selection be reserved from sale by any act of congress or proclamation of the president. When the selection and location, as is said in *Doll v. Meador*, 16 Cal., 320, are once made pursuant to the state's directions, of lands not reserved but subject to location, the general gift of the quantity becomes a particular gift of the specific lands located, vesting in her a perfect and absolute title to the same; and that title passes by her patent. But whilst affirming the correctness of this adjudication, we add to it what is equally obvious, that when the selection and location are of lands which are reserved from sale and are not subject to location, no title vests in the state, and, of course, none passes by her patent.

The state patent takes effect, by relation, as of the date of the selection, May 1, 1868. The defendant contends that on that day the lands selected were reserved from sale by acts of congress passed in 1862 and 1864, and proceedings taken under them. And he produces directions of the land department, to show that the premises had been withdrawn from sale under those acts.

Our conclusion from the evidence is, that the land embraced by the patent to the plaintiff was reserved from sale when selected by the locating agent, as part of the five hundred thousand acres granted to the state, and that such selection was inoperative and void. The approval of the commissioner of the land office and of the secretary of the interior of the list of selections, so far as the list embraced the premises in controversy, was equally inoperative. No interest by either proceeding was vested in the state. This result would follow without any legislation to that effect, from the condition annexed to the grant, that the selection must be made from lands not reserved from sale by any law of congress or proclamation of the president, but as is to preclude any possible discussion upon the question, the act of congress of August 3, 1854, providing for vesting the title in the states of lands certified to them, declares that in all cases where lands are granted by any law of congress to any state or territory, and the law "does not convey the fee-simple title of such lands, or require patents to be issued therefor," the lists of such lands certified by the commissioner of the general land office where the lands are not of the character embraced by the acts of congress, and are not intended to be granted thereby, shall, so far as such lands are concerned, "be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby." (10 Stats. at Large, 346.) The donating act of 1841 does not convey the fee-simple title to any specific kinds, or require patents to be issued therefor; it only vests an immediate right to a specific quantity to be afterwards selected under the direction of the state. And should the selection

be postponed until after the land is reserved or otherwise appropriated, the interest of the state would lapse and fail. The lands donated to the state are precisely those to which the act of congress refers when it declares the effect of the list certified by the commissioner.

Second—The lands selected by the agent of the state having been at the time of the selection thus reserved from sale, and the selection being therefore void, the second question arises, whether the defendant can set up this fact to defeat the plaintiff's recovery on the state patent.

The defendant claims title to the demanded premises under patents of the United States, bearing date in March, August, and September, 1873, issued to different parties upon pre-emption settlements made by the patentees on the fifth of July, 1870. On that day the reservation from sale by the proceedings already detailed, was withdrawn, and the lands were opened to pre-emption and homestead entries. The defendant claiming under the patents thus issued, has a standing in a court of law, and occupies a position with respect to the property which enables him to assail the title of the plaintiff.

SEVENTH POINT.

The decision of the commissioner of the general land office and the secretary of the interior not to allow the homestead entry of the complainant is not conclusive, neither is the approval and certification of the lists by the secretary of the interior of lands selected by the state final.

The secretary of the interior, Hon. Henry M. Teller, in deciding the question June 25, 1884, presented on rehearing, says:

> I refused, however, to disturb the former adjudication, and said that the title created by the certification **could only be considered by the courts in due course of law.**

If a patent is issued as a result of fraud, mistake, or erroneous construction of law, then a court of equity will grant relief.

Steel v. Smelting Co., 106 U. S., 451.
Smelting Co. v. Kemp, 104 U. S., 636.
Johnson v. Towsley, 13 Wall., 72.
Moore v. Robbins, 96 U. S., 534.
Shepley v. Cowan, 91 U. S., 340.

In *U. S. v. Hendy*, 54 Fed. Rep., 447, the court say (I quote from the syllabi):

> The listing and certification of certain lands to the state of California under 19 Stat. at Large, p. 267, is not conclusive upon a federal circuit court as to the findings of fact implied by the approval of the land office, but such court can set it aside for inadvertence or mistake.

In *Williams v. U. S.*, 138 U. S., 514, the court holds:

> If, through inadvertence or mistake, a wrong description is placed in a conveyance of real estate by an individual, a court of equity would have jurisdiction to interfere and restore to the party the title which he never intended to convey, and it has a like jurisdiction when a wrong description from a like cause gets into a patent of public land.

EIGHTH POINT.

The claim of the defendants to being innocent purchasers ought not to prevail.

1. Because the issuance of the patent was in violation of law, and illegal. Where a person must trace his title through a grant from the general government, he is charged with notice of the law under which the officers act, and is bound to inform himself as to the extent or limitation of the power and authority of such officers. Where the right of a party depends upon the statute, he is presumed to take notice of the contents of the statute.

2. The patent issued by the state of Nebraska to the Midland Pacific Railway Company recites that the section of land in question was selected by the state of Nebraska under and pursuant to the act of September 4, 1841. This patent had been filed for record at the time the respondents purchased the land, so that they were at least constructively notified by recital in one of the deeds through which they trace their title, that the selection of the lands by the state and the confirmation by the general government was made, or attempted to be

made, under and pursuant to power conferred by the act of September 4, 1841. They were notified by that act that the state only had authority to select, and the general government power to confirm lands known as single minimum lands, subject to private entry and sale, at $1.25 an acre. That was the only kind of lands that the state could acquire under that act. The respondents were thereby put upon inquiry and were bound to inquire whether or not the lands in question selected by the state of Nebraska, and subsequently conveyed to them through several *mesne* conveyances, were of the kind and character mentioned in the act of September 4, 1841. They could not shut their eyes and innocently presume that the general government confirmed to the state lands subject to private entry and sale.

In *Southern Pacific R. R. Co. v. Dull*, 22 Fed. Rep., 499, the court say:

> The grant to complainant was by statute, of which all the world must take notice; and by virtue of the same statute it became attached to the particular land, and became specific on the filing of the maps in the offices of the commissioners of the general land office, which also became a public record, pointed out by the statute itself as the place to go for information as to the specific land to which the grant should become attached. The statute and the map became the official record of the grant, and were open to all, and were notice to all the world of the extent of the grant. After the filing of the plat it was only necessary to read the statute and compare it with the map on file and the record of the public surveys, with reference to which the map was made, to ascertain that the land in question was embraced in the grant. * * * The rights of complainant, therefore, were fully disclosed by the statute and public records of the United States, of which everybody in law is bound to take notice, and if the defendant Scheffelin did not, in fact, have actual notice, he had legal notice. He was bound to know these facts so disclosed by the statutes and public records of the United States.

3. The deed from David S. Gray to the respondents is a special warranty deed. In fact, a quitclaim deed. (See record, p. 134.) There is no warranty of title except against the acts of the grantor. In other words, the grantor simply conveyed the title he had; hence,

under the well known rule announced by the supreme court, the respondents were not *bona fide* purchasers. The fact that respondents' grantor gave only a quitclaim deed or a special warranty deed, should have aroused their suspicions and put them upon inquiry. Where the grantor refuses to warrant the title and makes only a special warranty or quitclaim deed, there is good reason to believe that the grantor fears there may be some defect in the title for which he may be called to account. Respondents do not claim to be ignorant of the source or history of their title, but assert simply that they had no knowledge of the claim of the complainant. (See record, p. 14.)

Oliver v. Piatt, 2 Howard, 333.
May v. Le Claire, 11 Wall., 217.
Dunn v. Barnum, 10 U. S. Appeals, 96.

In *May v. Le Claire, supra*, the supreme court say:

> That on the 27th day of July, 1859, Dessaint conveyed by a deed of quitclaim to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey.

This doctrine is affirmed in *Dickerson v. Colgrove*, 100 U. S., 578.

The appellees do not claim that they were ignorant of the defects in their title. (See testimony of appellees, pp. 12 and 13.)

We conclude, then, that the land in controversy was part of an even numbered section situated within the limits of the Burlington & Missouri River Railroad Company's land grant; that by order of the commissioner of the general land office it was raised in price to $2.50 per acre, and declared to be subject only to homestead and pre-emption at that price; that therefore it was not subject to selection by the state under the internal improvement act of September 4, 1841, and the

selection made by the state under that act, and the subsequent confirmation by the interior department, was illegal and void. The respondents, therefore, should be decreed to convey to the complainant whatever title they possess. If, however, the court finds from the evidence that there is a defect in the title of respondents, as we think there undoubtedly is, then a decree should be entered quieting the title in the complainant and enjoining the respondents from prosecuting their action at law.

G. M. LAMBERTSON,
J. W. DEWEESE,
Solicitors for Appellant.

165-386

Office Supreme Court, U. S.
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165-386

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 151.

JAMES M. DEWEESE, JR.,
Appellant,
v.
JACOB R. REINHARD, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief and Argument for Appellees.

CHAS. E. MAGOON,
CHAS. OFFUTT,
Solicitors for Appellees.

Raber, Printer, N. Y. Life Building, Omaha.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 151.

JAMES M. DEWEESE, JR., *Appellant*,
v.
JACOB R. REINHARD, ET AL., *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief and Argument for Appellees.

This is an appeal from a decision of the United States Circuit Court of Appeals for the Eighth Circuit. That decision is reported in 61 Fed. Rep., 777-781, and 19 C. C. A., 698-707.

A STATEMENT OF THE FACTS OF THIS CASE demonstrates that the bill of the appellant, the complainant below, was without merit and void of any equity.

The controversy involves the title to Section Fourteen (14), Township Five (5), Range Three (3), East of the Sixth Principal Meridian, in Saline County, Nebraska. The legal title is conceded to be in the appellees, but the equitable title to the North East

quarter thereof is claimed by the appellant. The merits of this *equity* is the only question presented by this appeal.

Appellant's original bill was exhibited on the 8th of October, 1888, to enjoin the prosecution by appellees of an action in ejectment for the same property, begun by them as citizens of the State of Ohio, in the same court, on the 16th of November, 1885,—*nearly three years before.*

APPELLEES' TITLE IS CONCEDED TO BE AS FOLLOWS:

The State of Nebraska, upon its admission into the Union, by the provisions of Section 8 of the Act of Congress, approved September 4, 1841, entitled "An Act to appropriate the proceeds of the sales of the public lands, and to grant Pre-emption Rights," (5 U. S. Stats. at Large, 455), became entitled to 500,000 acres of land to aid in promoting its internal improvements.

March 26, 1868, pursuant to this act, the State of Nebraska selected 359,708 acres of land, including the section in controversy, as part of this grant. (Exhibit "D ½," Record, p. 97.)

March 24, 1870, this selection was approved by Jas. S. Wilson, Commissioner of the General Land Office, in these words:

> "I hereby certify that the tracts of land in the foregoing lists are embraced in the original lists of lands selected by the duly authorized agents of the State of Nebraska under the provisions of the Act of Congress approved September 4, 1841, entitled an 'An Act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights,' which original lists are on file in this office.
>
> "*And I further certify that the same have been carefully examined and compared with the township plats and tract books of this office and are found to be free from conflict; and I respectfully recommend that the same be approved subject to any valid interfering rights*

which may have existed at the date of selection.

[SEAL.] JAS. S. WILSON,
Commissioner."

(Record, p. 98.)

March 29, 1870, this action was, by the Secretary of the Interior, "Approved subject to all the rights above mentioned;" that is, subject only to "*any valid interfering rights which may have* EXISTED AT THE DATE OF SELECTION".

April 20, 1871, by its Letters Patent, the State of Nebraska conveyed 100,000 acres of these lands, including the section here involved (Exhibit "E", Record p. 99) to The Midland Pacific Railway Company, in execution and satisfaction of a solemn contract made by this State, through an act of its Legislature, approved February 16, 1869. (Acts of Legislature of Nebraska, Session of 1869, p. 153.)

November 6, 1871, The Midland Pacific Railway Company, by deed of general warranty, and "in consideration of $125,000 lawful money of the United States to them paid" by Joel N. Converse, conveyed to said Converse, a large portion of said lands, including the section in controversy. (Exhibit "F," Record, pp. 101-112.)

December 10, 1873, Joel N. Converse and wife conveyed all of said lands to David S. Gray, Trustee for Joel N. Converse & Co. (Exhibit "G," Record, pp. 113-117.)

November 11, 1878, David S. Gray, as trustee, conveyed all of said section fourteen (14), township five (5), range three (3), east of sixth (6th) principal meridian, to Jacob Reinhard, one of the appellees, and Frederick Fieser, (Exhibit "H," Record)

pp. 117-119.) Reinhard and Fieser paid for this section $7,680.00 cash, on the delivery of the deed, and neither of them had any knowledge of any defect in the title, or that any one claimed or made pretense that there was such defect. (Depositions of Reinhard, Fieser and Gray, Record, pp. 11-14. At this time, indeed, there had not been from any source whatever, any intimation that the title of their grantors was not absolutely perfect, and the possession of their grantors had been uninterrupted, unquestioned and undisputed from March 26, 1868, the day the lands were selected from the Federal Government by the State of Nebraska.

Since their purchase, the appellees have paid, and prior thereto, their grantors have paid, all the taxes of every kind and description levied or assessed upon said land, amounting on the date of the trial of this case to a total of $1,375.81. (Exhibit "N," Record, p. 133.)

May 12, 1892, Frederick Feiser having died, the appellant's action was by consent, revived against his heirs at law and devisees, who are the appellees other than Reinhard aforesaid. (Record, p. 14.)

These are the undisputed and indisputable facts upon which the title of the appellees rests.

THE APPELLANT'S CLAIM,

for it is confessedly nothing more tham a *claim*—rests upon the fact that on

May 31, 1883, —after there had been five recorded conveyances of the land—more than fifteen years

after it had been selected by the State of Nebraska—more than thirteen years after the General Land Office of the United States and the Secretary of the Interior had approved the selection—more than twelve years after the State of Nebraska had conveyed it to The Midland Pacific Railway Company—more than eleven years after the state's grantee had conveyed it for full value to Converse—more than four years after David S. Gray, trustee, had conveyed it, in consideration of $7,680, to the appellees—and *after appellant had actual notice of appellee's claim* (Record, pp. 26-27)—he, before taking possession, and before he saw the land, (Record, p. 26) made application to enter the particular quarter of said section here involved, as a homestead, in the local Land Office in Beatrice, Nebraska.

May 31, 1883, appellant's said application was indorsed:

> "U. S. LAND OFFICE.
> BEATRICE, NEB., MAY 31, 1893.
> This application is hereby rejected for the reason that the land described was selected by the State of Nebraska, March 26, 1868, which selection was approved March 29, 1870, as per list No. 7.
>
> H. W. PARKER,
> *Register.*"

(Record, p. 76.)

In June, 1883, after this application was rejected, and in open defiance of the Land Department of the Federal Government—with the avowed purpose of taking by force what he knew appellees owned and had paid for—appellant went upon the land with a view, as he says, of entering it as a homestead, (Record, p. 26) and appealed from the decision of the Regis-

ter of the local Land Office at Beatrice, to the Commissioner of the General Land Office.

July 7, 1883. before appellant could possibly have had time to make any improvements of consesequence upon the land the Commissioner of the General Land Office affirmed the decision of the Register, the Commissioner saying in his decision, *inter alia*:

> "In view of the fact, however, that the land has been patented to the state (a transcript of the approved list under seal of this office in the hands of the Governor being equivalent to a patent), AND THAT THE GRANT FOR INTERNAL IMPROVEMENTS HAS BEEN DECLARED CLOSED, the full quantity of 500,000 acres to which it was entitled having been approved and certified, I am of opinion that *said land is not subject to entry and will not be so subject until the title vested in the state by the approval and certification of said tract has been reconveyed to the United States, and the selection duly canceled on the records of this and the local office.*" (Record, p. 88.)

From this decision an appeal was taken to the Secretary of the Interior.

January 18, 1884, the Secretary of the Interior affirmed the previous decisions of the Commissioner and Register, using this language:

> "The approval and certification of this land to the state was a final adjudication of all questions pertaining to the title thereto, so far as this Department is concerned, and you very properly refuse to permit said entries to be made. Your decision is therefore affirmed." (Record, p. 93.)

April 25, 1884. appellant presented to the Secretary of the Interior a motion for a review of these adverse rulings, offering the same objections to appel-

lees' title which here urged. (Record, pp. 94-95.)

June 25, 1884, this motion was denied. (Record, pp. 95-96.)

So whatever appellant did in the way of improving the land was clearly at his own peril and in full knowledge of all the facts. He had not even the right to complain of tardiness in the rulings made by the Land Department.

July 6, 1888, appellant tendered to the local Land Office at Beatrice his alleged final proof that he had complied with the terms and conditions of the homestead laws of the United States. The Register made the following ruling thereon;

"The foregoing proof is rejected on account of the State or Nebraska. Selected, March 26, 1888. List approved March 29, 1870, No. 7, and application to enter the same rejected January 21, 1884, as shown by the records of this office.

T. B. DAVIS, Register."

From this decision no appeal was taken. Appellant rested upon his rights (!), defiantly squatted upon the land and made no appeal to the courts from May 31, 1883, until October 8, 1888—five years and five months—though the appellees, vigilant of their rights, had begun proceedings to eject appellant as early as November 16, 1885.

In the meantime appellant has had the misfortune of living upon and using this land rent free, without a penny of outlay, burdened only with enjoying the rich harvest which it annually yielded from "in the month of June, 1883," to this date, and embarrassed only by the fact that appellees paid all the taxes and every other charge thereon, leaving to appellant only the curse of sowing and reaping.

This is the case, brought after this length of time, in a court of conscience. We submit that the prosecution of the action is a

libel upon Equity Jurisprudence. *Aequitas neminem juvat cum injuria alterius.*

The bill of complaint, after reciting the possession of the appellant since June, 1883, a possession which the proof demonstrates was taken and held as we have stated:

"Alleges the facts to be that said lands above described lie within the limits of the grant of land made by the United States to the Burlington & Missouri River Railroad Company by act of Congress approved July 2, 1864, and that by virtue of said act the Land Department of the United States withdrew from private entry the even numbered sections of land within the limits of said grant. That still later and by virtue of the act of Congress approved March 6, 1868, the even numbered sections of land within the limits of said grant were made subject to pre-emption and homestead entry, said lands being raised to double minimum and subject to homestead and pre-emption entry, but not subject to private entry as were the government lands outside the limits of said grant." (Record, p. 3.)

And it is upon this *alleged* technical defect in the authority of the Federal Government to convey to the State of Nebraska, and upon this alone, that the appellant claims that he, on his own motion and alone, as a mere volunteer, without the intervention of the United States, and not only without any recognition of his claim by the United States or any privity with them, but in the face of its protest, thrice over repeated, can annul and set aside a grant made by the United States to the State of Nebraska, fourteen years before appellant was of the age to entitle him to a homestead. (Record, p. 16). And that, too, long after the State and its subsequent grantees had upon the faith of the conveyance by the United States for valuable consideration, sold the land over and over, again and again; and this without an offer to return a tithe of the expenditures made by these grantees. Conceding every fact claimed by the appellant, this question still confronts the Court. So we say that, in any view, the claim of the appellant is unjust and inequitable—if not unconscionable. It cannot be enforced without compelling both the United States and the State of Nebraska to repudiate contracts upon the faith of which large sums of money have been expended. The Trial Court said that a Court of Chancery would not

lend its aid to any such scheme, and dismissed the bill, adjudging the appellant's cause to be "without equity" and that appellant was "without the right to any relief against the defendants (Appellees) or any of them." (Record, p. 135). The Circuit Court of Appeals for the Eighth Circuit was of the same opinion and decreed accordingly. (Record, p. 143-8.

This Court is asked to affirm those decrees.

FIRST POINT.

The Appellant is Without the Right to Prosecute, as Complainant, and, in His Own Name, an Action to Set Aside the Patent Granted by the United States, and Under Which the Appellees Claim. The Uniform Rulings Have Been That Such Action Shall Be Prosecuted, Either by the United States, or, by Some One Whose Rights, Having Their Inception Prior to the Issue of the Patent, Have Been so far Recognized by the Federal Government as to Place Him in Privity Therewith.

The appellant's claim of privity with the Government has no foundation, for the reason that the Government expressly refused to place him in such condition. Not only did the Government refuse him this privilege, but his subsequent act of unauthorized entry, as we shall show under the Second Point of this argument, made him a law-breaker and placed him beyond the possibility of establishing such privity.

This is not a case where the appellant, *as defendant*, is undertaking *to oppose* the action of the appellees to enforce their title. Andthis fact is of controlling importance in determining this case. For here it must always be borne in mind that *the appellant is the aggressor. He attacks the title of the appellees.* He must, therefore, upon familiar principles, recover upon the strength of his own title; not upon the weakness of that of the appellees. The cause of the defendant is always the better. *Actore non probante, reus absolvitur.*

It avails the appellant nothing to show, as he alleges in his bill,

that "said lands lie within the limits of the grant of lands made by the United States to the Burlington & Missouri River Railroad Company," and were not "subject to private entry," unless he further shows that the title of the appellees conflicts with some *better right which he had therein*. The Federal Government made the grant under which appellees claim. It had the fee simple title absolute. At the time the grant was made the appellant was a mere babe, (Record, p. 16) and, therefore, had no possibility of a homestead right therein.

The right of the United States to dispose of the fee of lands occupied by them has always been upheld by the Supreme Court from the foundation of the government. *Buttz v. N. Pac. R. Co.*, 119 U. S., 55, citing *Beecher v. Wetherby*, 95 U. S., 517.

There is no law which compels the government to be more unconscionable than an individual. Private persons may acquiesce in their deeds and permit all grants made thereby to remain, even though originally invalid. And so it is within the power of the Government, even though it may be of the opinion that, strictly speaking, its grant was void, to refuse to seek its cancellation. The Government may, like individuals, conclude that the equities of the situation are such that it would be unfair and unreasonable for it to seek to vacate or annul the acts of its officers, particularly after they have been long acquiesced in and subsequent rights have been acquired upon the faith thereof. This was the view of the officers of the Land Department as expressed by the Commissioner of the General Land Office in his rulings of July 7, 1883, when he stated that the Government would not disregard the patent which had been issued to the state, because "the grant for internal improvements had been declared closed, the full quantity of 500,000 acres to which it, (the State of Nebraska), was entitled, having been approved and certified." (Record, p. 88). Here was a reason perfectly good and amply sufficient why it was unfair and inequitable for the Government to disregard the patent which it had made to the state.

When the appellant sought to acquire a right *from* the Government, the Government promptly told him of the situation and refused to entertain his application. As the appellant had then

never been upon or seen the land, he had no rights in it and his case is to be tested here by the rights (?) he acquired by making an application and having it refused before he saw the lands. He has no other or greater right, yet it has been held over and over that occupation and improvement on public lands with a view to pre-emption do not confer a vested right in the land. *Frisbie v. Whitney*, 9 Wallace, 187. If the officers of the Land Department had the power to withdraw this land from the right of entry and pre-emption, they had the right to refuse appellant's application to enter the land, made on May 31, 1883. As to the appellant, by the refusal of his application, the land in controversy was as much segregated from the public domain, by the issue of the patent to the State of Nebraska, as it would have been if there were no dispute about the authority for its issue.

The Supreme Court of the United States have firmly established the rule "that lands originally public cease to be public after the grant of a patent or after they have been entered at the land office and a certificate of entry has been obtained."

Witherspoon v. Duncan, 4 Wall., 210.

Carrol v. Safford, 3 How., 441.

Hastings, etc., R. R. Co. v. Whitney, 132 U. S., 361.

Kansas Pacific Railway v. Dunmeyer, 113 U. S., 629.

Wilcox v. Jackson, 13 Pet., 498.

In *Hastings, etc., Railroad Co. v. Whitney*, the Court says:

"The doctrine first announced in *Wilcox v. Jackson*, 13 Pet., 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it, has been reaffirmed and applied by this Court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country. In *Witherspoon v. Duncan*, 4 Wall., 210, this Court decided, in accordance with the decision in *Carroll v. Safford*, 3 How., 441, that lands originally public cease to be public after they have been entered at the Land Office, and a certificate of entry has been obtained. And the Court further held that this applies as well to

homestead and pre-emption as to cash entries. In either case, the entry being made, and the certificate being executed and delivered, the particular land thereby entered becomes segregated from the mass of public lands, and takes the character of private property. The fact that such an entry may not be confirmed by the Land Office on account of any alleged defect therein, or may be canceled or declared forfeited on account of non-compliance with the law, or even declared void, after a patent has been issued, on account of fraud, in a direct proceeding, for that purpose in the courts, is an incident inherent in all entries of the public lands. In the light of these decisions the almost uniform practice of the Department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale, or grant, until the original entry be canceled or declared forfeited; in which case the land reverts to the Government as part of the public domain, and becomes again subject to entry under the land laws. The correctness of this holding has been sustained by this Court in the case of

Kansas Pacific Ry. v. Dunmeyer, 113 U. S., 629.

It is apparent from these decisions that the land herein involved was not a part of the public domain when appellant attempted to file his homestead entry thereon; that his application was properly rejected and that his subsequent entry thereon was a trespass, and his possession a wrongful act from which he derives no rights.

"One who acquires land knowing that it covers a portion of a tract claimed by another, will be held either not to mean to acquire the tract of the other, or will be considered to be watching for the accidental mistake of others and preparing to take advantage of them, and as such not entitled to receive aid from a Court of Equity."

Cragin v. Powell, 128 U. S., 692.
Taylor v. Brown, 5 Cranch, 234, 256.

Because appellant did not receive from the Government any recognition of his application to enter, and thereafter went upon the land in defiance of the Government, he stands before this Court as a mere volunteer and intruder. *Frisbie v. Whitney*, 9 Wallace, 187.

The land belonged to the Government. It granted it as a part of its obligation to grant a total of 500,000 acres to the State of

Nebraska. After this obligation had been, by both parties, executed—"declared closed"—appellant *sua sponte*, had no more right to complain than any volunteer would have to challenge a deed from Richard Roe to John Doe. This has been the uniform and unvarying decision of all the courts, Federal and State, since the foundation of the Government, *whenever a party was, as complainant, attacking the title of a defendant holding under a patent from the Government, Note, please, the qualification. We are claiming only that the defect in the defendant's title cannot be used "as a sword" in the hands of a complainant himself without title or recognition of title.*

In *Cooper v. Roberts*, 18 How., 173, decided in 1855, the suit was brought by one holding title under a patent of the State of Michigan, conveying a tract of what was claimed to be school land, against one who had obtained possession under a lease by the Secretary of War for mining purposes. The title of the State was adjudged to be good as against the United States and the defendant in possession. The defendant then objected to the plaintiff's right of recovery because "the officers of the state violated the statutes of Michigan in selling the lands, after they were known or might have been known to contain minerals." As to this, Mr. Justice Campbell, speaking for the Court, at page 182, said:

"Without a nice inquiry into these statutes, to ascertain whether they reserve such lands from sale, or into the disputed fact whether they were known, or might have been known, to contain minerals, we are of the opinion that the defendant is not in a condition to raise the question on this issue. The officers of the State of Michigan, embracing the chief magistrate of the State, and who have the charge and superintendence of this property, certify this sale to have been made pursuant to the law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim in privity with Michigan, but holds an adverse right, and is a trespasser upon the land to which her title is attached. Michigan has not complained of the sale, and retains, so far as this case shows, the price paid for it. Under these circumstance we must regard the patent conclusive of the fact of a valid and regular sale on this issue."

So in *Field v. Seabury*, 19 Howard, 323, decided in 1856, the Court said in the syllabus:

"Where a patent or grant of land issues from the Government, either the legislative or executive branch, it can only be impeached for fraud *at the suit of the government.*"

And in the course of the opinion, at page 332, the Court added:

"In England, a bill in equity lies to set aside letters patent from the King by fraud, (*Att. Gen. v. Vernon*, 270, 277; the same case, 2 Ch. Rep., 353,) and it would in the United States; *but it is a question exclusively between the sovereignity making the grant and the grantee.*"

In *Spencer v. Lapsley*, 20 Howard, 264-280, decided in 1857, the Court at page 273, say respecting such a claimant:

"He entered without a color of title. Neither the State of Coahuila and Texas, nor the Republic of Texas, nor the State of Texas, has taken measures to cancel this grant, nor have they conferred on the defendant any commission to vindicate them from wrong. He is a mere volunteer. The doctrines of this Court do not favor such a litigant."

In *White v. Burnley*, 20 How., 245-251, at page 247, the Court said:

"A regular grant (that is, a completed title made by those exercising proper political power to grant lands) is not open to this objection by an opposing claimant setting up *a younger title*, and we understand that on this principle the well considered cases of *Hancock v. McKinney*, 7 Texas, 384, and *Swift v. Herrera*, 9 Texas, 263, proceed. Such is the settled doctrine elsewhere. *Overton v. Campbell*, 5 Hayw. Tenn. R. 108 is to the effect that it can only be done by suit."

"How far the Government of Texas may interfere by due course of law, (that is, by suit in its own name and behalf), is a question for that Government to decide. *Owen v. Rains*, 5 Hayw. Tenn. R. 108, is to the effect that it can only be done by suit."

In discussing the effects of a patent in *Beard v. Federy*, 3 Wallace, 492, the Court say:

"When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the Government acts, and issues its patent to the claimant. This instrument

is, therefore, record evidence of the action of the Government upon the title of the claimant. * * * As against the Government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the Government by title subsequent. It is in this effect of the patent as a record of the Government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee in every suit for his lands to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, or was not properly located, and, therefore, he could not be disturbed by the patentee."

In *Ehrhardt v. Hogaboom*, 115 U. S., 67, decided in 1885, the suit was brought by one claiming title under a patent of the United States against one who contended that the patent was void because the lands were at the time of the pre-emption entry, swamp and overflowed lands, which passed to the State of California under an Act of Congress passed in 1850. As a *defense* to the action—note the difference in the case at bar, where the proof is offered that appelles' title is defective in order to enable appellant *as complainant to maintain his bill*—the defendant offered to prove the character of the land, but the Supreme Court of the United States held this offer was properly denied because the defendant was, as to the land in dispute, "a simple intruder, without claim or color of title. He was, therefore, in no position to call in question the validity of the patent of the United States, * * * and require the plaintiff to vindicate the action of the officers of the Land Department in issuing it."

In *Smelting Co. v. Kemp*, 104 U. S., 636-657, the Court said, at page 647:

"It does not lie in the mouth of a stranger to the title to com-

plain of the act of the Government with respect to it. If the Government is dissatisfied, it can on its own account, authorize proceedings to vacate the patent or limit its operation."

See also

Stark v. Starrs, 6 Wall., 418.
Bagnell v. Broderick, 13 Pet., 450.
Burgess v. Gray, 16 How., 48.
Wynn v. Morris, 20 How., 3.

In *Steel v. Smelting Co.*, 106 U. S., 447-457, three paragraphs of the syllabus were as follows:

"A patent executed in the required form, and by the proper officers, for such a portion of the public domain as is by law subject to sale or other disposal, passes the title thereto, and the finding of the facts by the Land Department, which authorizes its issue, is conclusive in a court of law. *Smelting Co. v. Kemp*, 104 U. S., 636.

"A party who claims to be aggrieved by such issue, although he cannot have the patent vacated or limited in its operation where it comes collaterally in question in an action for the recovery of possession, may obtain relief in a Court of Chancery, *if he has such an equitable right as will estop the patentee or those claiming under him, from asserting the legal title to the land. Otherwise such party must apply to the officers of the Government, who, although not clothed with the power to set the patent aside, may for that purpose bring suit in the name of the United States.*

"A party cannot invoke the doctrine of estoppel against the owners by reason of improvements which, with their knowledge, he put upon them the land, and if he was aware at that time that it belonged to them, and that he had no title to it."

In some of the state courts the same ruling has been made. Thus in *Crommelin v. Minter*, 9 Alabama, 594, before the Supreme Court of Alabama in 1846, it was decided that:

"A patent fraudulently obtained, or which has been issued in violation of law, is void, and does not authorize a recovery against a party in possession under color of title. But a mere intruder can not insist on the invalidity of the patent."

And so in *Doll v. Meador*, 16 Cal., 295, it was held by the Supreme Court of California, in 1860, that:

"A patent not void upon its face, cannot be questioned, either

collaterally or directly, by persons who do not show themselves to be in privity with a common or paramount source of title."

And the Court, in delivering its opinion was careful to say:

"The point here is as to the status of the party who can raise any question as to its (the patent's validity) when it is regular on its face."

And in commenting on many of these cases, in *Doolan v. Carr*, 125 U. S., 639, CHIEF JUSTICE WAITE said:

"I cannot but believe this is the true doctrine. If the Government is satisfied with what has been done, all others must be; and it will be deemed in law to be satisfied, unless it proceeds itself to correct the error or authorize some one else to do so."

Not only the Courts, but Congress as well have treated such settlers as the appellant, "as mere intruders and entitled to no consideration by the Government." The act of March 3, 1887, 24 U. S. Stats. at Large, 556, directs the Secretary of the Interior immediately to adjust, in accordance with the decisions of the Supreme Court of the United States, each of the land grants made by Congress to aid in the construction of railroads, and theretofore unadjusted, and to demand from the several companies a relinquishment of their title to all lands that had been erroneously certified or patented. It there provides, Section 4, that if any of the lands so erroneously certified or patented, with a few specified exceptions, have:

"Been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase, at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants shall respectively have been adjusted, and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company, which has so disposed of such lands, of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety

days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount."

This class of legislation was held to be valid in *Frisbie v. Whitney*, 9 Wallace, 187.

Then again, if the patent to the State is void, or voidable, the proper method of establishing that fact is for the United States Government to proceed by bill in chancery to have it annulled.

United States v. Throckmorton, 98 U. S., 61;
McLaughlin v. United States, 107 U. S., 526;
United States v. Stone, 2 Wall., 525;
Western Pacific R. R. Co. v. United States, 108 U. S., 510;
Smelting Co. v. Kemp, 104 U. S., 647;
Van Wyck v. Knevals, 106 U. S., 360.

And more, a patent cannot be impeached in a collateral action for any matter *de hors*, but only in a direct action by the Government for that purpose, in equity, by *scire facias*, or information. Individuals can resist the conclusiveness of the patent only by showing that it conflicts with *prior rights vested in them.*

Field v. Seabury, 19 How., 332;
Spencer v. Lapsley, 20 How., 272;
White v. Burnley, 20 How., 247;
Hoofnagle v. Anderson, 7 Wheaton, 212;
Bagnell v. Broderick, 13 Pet., 449;
Polk's Lessees v. Wendell, 5 Wheat. 293;
Moore v. Wilkinson, 13 California, 478;
Yount v. Howell, 14 California, 465.

REVIEWING THE APPELLANT'S AUTHORITIES ON THIS POINT

demonstrates that his learned counsel regard it as the turning point in this case—the very first thing for them to meet. So their first proposition is an effort to show that their client "is in a position to challenge the right and title of the respondents" (Appellees.) *Brief for appellant, pp. 7-19.*

We propose to review *seriatim* the authorities cited for Appel-

lant in the confidence that we can show that none of them sustain his position. They first cite *Shepley v. Cowan*, 91, U. S., 330, but clearly the appellant can take no comfort from the decision in that case. There the ruling was upon, and in express recognition of, the principle which we here invoke for the appellees, that "THE FIRST IN TIME IS DEEMED TO BE THE FIRST IN RIGHT."

Shepley v. Cowan was a suit in equity "to settle the conflicting claims of the parties arising from their respective patents," (p. 331). Mark you, *both had patents*. Therefore, both were in privity with the Government. The quotation from the opinion made by appellant shows clearly that the decision of the Court upholding the Chartrand title, was based upon the fact that "Chartrand, the ancestor, by his *previous settlement in 1833* upon the premises in controversy, obtained a better right to the premises, under the law then existing, than that acquired by McPherson by his *subsequent selection in 1849*." The case is authority for the appellees.

We fail to see the application of the quotation from, or the citation of *Cunningham v. Ashley*, 14 How., 377. In that case the Court held that the title of a pre-emption, under the act of May 26, 1830, was better than titles under floating rights under the act of July 14, 1832, and the act of June 19, 1834. There both parties had their claims recognized by the Government, and the older patent was held to prevail. The case does not discuss at all the question, nor does it announce any doctrine which would be applicable where the Government had refused to recognize the claim of either party.

The quotation from *Lytle v. State of Arkansas*, 9 Howard, 333, is misleading and has no bearing upon an application to enter, such as presented by the case at bar. In that case a bill was filed by the heirs of Nathan Cloyes to enforce a right of pre-emption based on an actual occupation and improvement of the land as early as 1829. The Act of 1830, (4 U. S. Stats. at Large, 420), gave to every occupant of such lands, prior to the passage of the Act, who had cultivated any part thereof in the year 1829, a right to enter at the minimum price, 160 acres, including his improvement. In 1831 Cloyes made application, and the *Register and Receiver*

both decided that he was entitled to enter the land they received his proof, and the money paid by the claimant was received by the Commissioner. (See syllabus). The defendants claimed under a patent issued to Governor Pope of Arkansas by virtue of a location made by Pope on January 30, 1833 —*four years after Cloyes*—under three Acts of Congress passed in 1831, 1832 and 1833 respectively. A demurrer by some of the defendants was sustained to the bill, although it alleged that the defendant patentees "*had both constructive and actual notice of the right of Cloyes*" (p. 330). The Court held that Cloyes had a vested right under the facts stated, and we need not question the wisdom of the decision, although Justices Catron, Nelson and Grier dissented.

Barnard's Heirs v. Ashley's Heirs, 18 Howard, 43, is disposed of by quoting the first paragraph of the syllabus in these words:

"*Both parties claiming under patents from the United States*, a Court of Chancery will inquire into the equities on which the patents were founded."

Ard v. Brandon, 156 U. S., 541, was a contest between a homestead entry, made in good faith, on public land, in June 1866, and one claiming under a patent issued by the United States to a railway company in November 1873, pursuant to the Act of Congress of July 26, 1866. The defendant who made the homestead entry, took possession of the land and made improvements thereon, breaking up part thereof "about the last of June 1866." In the fall of 1866 and in the spring of 1867, he did further work on the land and built a house thereon, and took every step necessary to be taken in order to make a homestead entry. He continously remained in possession from June 1866 to the institution of the action, which was in ejectment, by parties claiming under the patent issued in 1873 to the railway company. The Court said there could be "no question as to the good faith of the defendant. He went upon the land with the view of making it his home. He has occupied it ever since. He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault." The case

is far different from the one at bar. In the case at bar the conditions are reversed, because here the appellant sought to make an entry before he had seen the land and after he knew that for many years before it had been conveyed by the government to other parties.

Foss v. Hinkell, 20 Pacific, 393, S. C., 78 Cal., 158, was ejectment. The plaintiffs claimed title under a patent from the United States to the Southern Pacific Railroad Company, dated the 4th of April, 1879, and a deed of the company of date the *20th of June, 1887*, conveying this land to them. The defendant was a duly qualified pre-emptor, having entered into and held possession of the land in suit *since the 22d of April, 1886*, and ever since that day has been a *bona fide* pre-emption settler thereon. On the *10th day of June, 1887*, he tendered and deposited his declaratory statement, in due form, in the proper United States Land Office, and tendered therewith all legal fees for filing the same. At page 396, the Court, by PATTERSON, JR., says:

"Neither the company nor plaintiffs were ever in possession of the lands. *Defendant was in the actual possession more than a year prior to plaintiff's purchase from the company*, and has ever since been in exclusive possession, claiming the land under the pre-emption laws. *Ten days prior to the date of plaintiff's purchase from the company, defendant tendered a declaratory statement and the usual fees to the officers of the United States land office*, and upon their refusal to accept the same, he immediately filed an appeal to the Commissioner of the United States Land Office. *That appeal is still pending.* These facts, under the decision of the Supreme Court of the United States in *Doolan v. Carr*, 8 Sup. Ct. Rep., 1228, entitled the defendant to question the validity of the patent from the United States, and they exclude plaintiffs from the benefit of the act of congress passed March 3, 1887, for the relief of *bona fide* purchasers. They are not *bona fide* purchasers. 14 Copp, Land Owner, 214-217."

We cannot complain of this decision. The plaintiff was properly required to succeed on the strength of his own title, not the weakness of the defendant's.

And this, too, was the case in *Doolan v. Carr*, 125 U. S., 618.

There the grantee of the patentee was asserting the strength of his own title. The patent was issued to a railway company under an act of congress granting "*public* lands." When the patent issued and the plaintiff took conveyance there existed a claim of right to the land under the Mexican Government which was then *sub judice*, and to which, therefore, the phrase "public lands" could not attach (p. 632). We are prompted to account for the citation of this case by the supposition that learned counsel failed to examine it sufficiently even to see that the lamented Chief Justice Waite, and not Chief Justice Fuller, made the dissent from which alone they quote.

A full and comprehensive discussion of this question is found in the dissenting opinion of Chief Justice Waite, in *Doolan v. Carr*. The force of the Chief Justice's argument is not weakened by the fact of its being a dissenting opinion, for a review of the case shows that the point discussed was not raised on the trial of the cause. The Chief Justice considered the question to be sufficient importance to be raised for the first time in the reviewing Court. The majority of the Court did not agree with him on that proposition. From the statement of the case in the majority opinion it appears that the action was ejectment; that when the defendant offered proof to impeach the patent, the plaintiff objected on the ground—

"That the United States patent cannot be collaterally attacked *in this action;* that it can be attacked *by bill in equity only;* that the United States patent and the recitals therein contained are conclusive evidence *in this action*; that the legal title of the lands therein described was granted and transferred by the United States to the grantee named in said patent; and, taken in connection with the deed from the railroad company to the plaintiff, is conclusive evidence of the plaintiff's right to recover.

"The Court sustained the objection and refused to allow said proof, or any part of it, to be made, to which the defendants excepted.

"The case before us turns upon the correctness of the ruling of the Court on the proposition, that in this action at law, none of the evidence offered by the defendants could be received to impeach the validity of the patent, and that such an issue as that attempted

to be raised by the defendants could only be made by a suit in equity to set it aside."

Doolan v. Carr, 125 U. S., 624.

The question presented was whether the Court could consider matters in avoidance of a patent, in *an action at law*. The Court proceeding upon the familiar principle that in ejectment, the plaintiff must rely upon the strength of his own title, held, that when the patent was used as a weapon of offense in an action at law, its force could be avoided if the patent was void. In the case at bar the question is different. The attacking party is the party in possession. He is simply a "squatter." He is without title or recognition from the Government. The Government expressly refuses to consider him as in privity with it. He attacks the patent of the Government, and seeks to have title declared in him. He is without authority. He is simply a volunteer. This condition of fact presents a different question; being that of the right of an unauthorized individual to assail the action of his sovereign. This question was not passed upon in *Doolan v. Carr*, but forms the basis of the discussion by the chief justice.

This was the view which the Circuit Court of Appeals had of *Doolan v. Carr*, for Judge Thayer in delivering the opinion of that tribunal said: (Record, pp. 147-148.)

"In that case it was decided that a defendant in a suit in ejectment had the right to show by appropriate evidence that the patent under which his adversary claimed was utterly void. The Court appears to have sustained the admissibility of such evidence, in obedience to the old and familiar rule that in an ejectment suit the plaintiff always exposes his own title to attack, and must recover altogether on the strength thereof, rather than on the weakness of his adversary's title. But we do not understand that the Court intended to go beyond that point, or, to hold that a homestead or claimant may maintain a bill in equity to cancel, or to obtain the benefit of, a patent issued to a third party, when, as in the present case, the settlement on which the claimant relies was made without the sanction of the others of the land department, and years after the patent in question was issued. That view of the case seems to us to be utterly irreconcilable with sound doctrine and the decisions heretofore cited."

The same patent which was involved in *Doolan v. Carr* was

again before this Court in *Carr v. Quigley*, and on that hearing the patent to the railroad under which Carr claimed was adjudged good upon the grounds that the Mexican grant, with which the railroad grant was supposed to conflict, was a "*float*," and did not attach until located; that therefore the land within its exterior limits were not reserved to satisfy it, and the patent of the Government properly conveyed it to the railroad. *Carr v. Quigley*, 149 U. S., 652.

The claim of the appellees is the same. The grant to the Burlington & Missouri River Railroad Company was a "*float*." It did not attach until the lands were selected and approved, which was not done until after the land involved herein had been certified to the State.

In *Wirth v. Branson*, 98 U. S., 118, again we find both parties holding under patents from the Federal Government. The plaintiffs claimed under a patent issued February 20, 1868, the defendants held under a patent dated January 10, 1818, and proved that they and their grantors "had occupied, cultivated and had full and undisturbed possession of the land ever since November, 1843, paying the taxes thereon." And speaking with reference to the claim of the first patentee at page 121, the Court said:

"The public faith has become pledged to him and *any subsequent grant* of the same land to another party is void, unless the first location or entry be vacated and set aside. This was laid down as the principle in the case of *Lytle v. The State of Arkansas et al.* (9 How., 314), and has ever since been adhered to. See *Stark v. Starrs*, 6 Wall., 402. Subsequent cases which have seemed to be in conflict with these have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent; such as the payment of the price, the payment of the fees of surveying, or the like.

Red River & L. W. R. Co., v. Sture, 20 N. W. Rep., 229; S. C. 32 Minn., 95, and *B., K. & S. W. R. Co. v. Johnson*, 38 Kansas, 142, are both to the effect that as against a homesteader, a railroad company has not, under the act of March 3, 1875, a right-of-way vero the land occupied by such homesteader, unless such right was acquired by compliance with the provisions of the act before the date of his settlement.

The next case, *St. Paul & S. C. R. Co. v. Ward*, 40 N. W. Rep., 401, is a miscitation. We find no such case.

The quotation from *Bohall v. Dilla*, 114 U. S., 50, is misleading. The point really decided is favorable to the appellees as will appear from the syllabus at page 47, as follows:

"To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, it must appear that, by the law properly administered in the Land Department, the title should have been awarded to the latter; it is not sufficient to show that there was error in adjudging the title to the patentee."

In that case the United States had recognized the rights of both parties. The plaintiff had a patent, but the defendant had first entered the land, and before plaintiff sought to enter it, defendant had made settlement upon and improved the premises. The previous settlement and improvement was not, however, sufficient to enable the defendant to defeat the patentee.

Smelting Co. v. Kemp, 104 U. S., 636, shows, by the quotation which counsel make from the opinion, that "a stranger to the title cannot complain of the act of the Government in regard thereto." And *Steele v. Smelting Co.*, 106 U. S., 447, declares that the party attacking a patent must have "such an equitable right as will estop the patentee, or those claiming under him."

Van Wyck v. Knevals, 106 U. S., 360, sustains our position. Note the following language from the syllabus:

"Subject to the objections therein mentioned, the act of July, 23, 1866, c. 212, granted, for the use and benefit of the St. Joseph and Denver City Railroad Company, the odd-numbered sections of public land within a prescribed distance on each side of the proposed road. The company duly filed in the office of the Secretary of the Interior a map showing the definite location of the line of the road. *Held*, that the grant was *in praesenti*, and attached to those sections as soon as the map was so filed. *No valid adverse right of title* to any part of them could be acquired *by a subsequent settlement or entry.*

"On the failure of the company to complete the work, a forfeiture of the grant, if it resulted therefrom, *can be enforced only by the United States through judicial proceedings, or the action of*

Congress. A third party cannot set it up to validate his title, nor avail himself of the fact that the company, in constructing, deviated from the original line, if the lands which he claims are within the prescribed distance from it and the road as built."

Frasher v. O' Connor, 115 U. S., 102, is equally satisfactory to the appellees. There the Court say:

"Lists of lands certified to the state by the Commissioner of the General Land Office, and the Secretary of the Interior, convey as complete a title as patents; and lands embraced therein are not thereafter open to settlement and pre-emption."

Monroe Cattle Co. v. Becker, 147 U. S., 57, was a contest between a patentee and one whose rights had attached *before* the patent issued. Hence, the language in the opinion. The Court would not sustain the position "that the *subsequent issuing* of a patent put an end to the equitable rights of the appellant."

Holland v. Challen, 110 U. S., 15, only decides that a Court of Equity will entertain a bill to quiet title to lands, though the complainant is not occupying the property, if it is wild, uncultivated and uninclosed, incapable of actual possession and occupation. Certainly this does not apply to the appellees' claim based upon his alleged actual occupation and improvement of the lands.

Curtner v. United State, 149 U. S., 662;
United States v. Beebe, 127 U. S., 338;
United States v. Minor, 114 U. S., 233;
United States v. San Jacinto Tin Co., 125 U. S., 273, and
United States v. M. K. & T. Ry. Co., 37 Fed. Rep., 72,

were all actions instituted by the United States in its own name to set aside patents. Just what should have been done in this case, if the allegations in appellant's bill are true. None of these cases hold that a third party standing in the position of appellant, can assert this right in his own name.

In *Rector v. Gibbon*, 111 U. S., 291, there was a demurrer to the bill which the Supreme Court said was erroneously sustained in the trial court. The bill showed that the complainant had posses-

sion as early as 1839 and made valuable improvements. The defendants claimed under a junior title.

In all these cases the Courts have favored the party first in time, and in none of them has the title of the patentee been successfully assailed, except by the Government or one in privity with the Government, that is, one whose claim has been in some way acquiesced in or recognized by the Government. Obviously this should be so.

SECOND POINT.

The Appellant is Without Title or Right of Title at Law or in Equity and His Claim is in Direct Violation of the Federal Statutes.

At the time the appellant settled upon the land in controversy, it had been withdrawn from entry and settlement by the Land Department, and when he applied to the Beatrice Land Office for leave to file his homestead entry thereon, he was so informed, and his entry refused. Thereupon he appealed the matter to the Commissioner of the General Land Office, who sustained the action of the local Land Office; then he appealed to the Secretary of the Interior who sustained the ruling of the Commissioner. In defiance of these rulings he went upon the land and sought to exercise the rights of ownership and control thereover. Even if this land was at this time a portion of the public domain, it was by law committed to the Land Department of the Government, which alone exercised authority thereover. His unwarranted acts render him amenable to the following statute:

"If any person or persons shall take possession of or make a settlement on any lands ceded or secured to the United States by any treaty made with a foreign nation, or by a cession by any state to the United States, which lands shall not have been previously sold, ceded or leased by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States; or if any person or persons shall cause such lands to be thus occupied, taken possession of, or settled; or shall survey, or attempt to survey, or cause to be surveyed, any such lands, or designate any boundaries thereon, by

marking trees, or otherwise, until thereto duly authorized by law, such offender or offenders shall forfeit his or their right, title and claim, if any he hath, or they have, of whatever nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possession of, or settled, or cause to be occupied, taken possession of or settled, or which he or they shall have surveyed, or attempt to survey, or cause to be surveyed, or the boundaries thereof he or they shall have designated by marking trees or otherwise. And it shall, moreover, be lawful for the President of the United States to direct the marshal, or officer acting as marshal, in the manner hereinafter directed, and also to take such other measures, and to employ such military force as he may judge necessary and proper, to remove from said lands ceded or secured to the United States by treaty or cession, as aforesaid, any person or persons who shall hereafter take possession of the same, or make or attempt to make a settlement thereon, until thereunto authorized by law. And every right, title or claim forfeited under this act shall be taken and deemed to be vested in the United States, without any other or further proceedings; and it shall be lawful for the proper marshal, or officer acting as marshal, under such instructions as may for that purpose be given by the President of the United States, to remove from such lands any and every person or persons who shall be found on them." Section 476, p. 179, Gen. and Permanent U. S. Land Laws; Vol. 2, Gen. Stats., 445, 480.

It therefore follows that if the land herein had been public land, the acts of the appellant relative thereto were unlawful, and he could claim no rights by reason thereof. The appellees contend that the land had ceased to be public land, and by reason of the selection by the State and approval by the Interior Department had been segregated from the public domain.

THIRD POINT.

The Rights of the Appellant, if Any Exist, Are Inferior to the Rights of the Appellees, and Are Subject Thereto.

It is not claimed by the appellant that his title ante-dates that of the appellees. We have seen that the inception of his title is in fact of a much later date than that of our clients. The patent had been issued to the State long prior to the time of his attempt to file

an entry on this land in the Beatrice Land Office. At the time of the issuance of the patent to the State, appellant had not even attained the years of his majority. (Testimony of Deweese, pp. 16-17.

The leading case is that of *Hoofnagle v. Anderson*, 7 Wheaton, 214. The controversy was between the holders of two Virginia military land warrants, who had made their entries on the same tract of land. One entered and received his patent eighteen months before the other located his warrant. At the trial the holder of the junior warrant sought to show that the former grant was "obtained contrary to law, being founded on a warrant which was issued by fraud or mistake;" but the Court, speaking by Chief Justice Marshall, said:

"The title of the respondent to the particular tract included in his patent, was complete before that of the appellants commenced. It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. Courts of equity have considered an entry as the commencement of title, and have sustained a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made. But they have gone no further. They have never sustained an entry made after the date of the patent. They have always rejected such claims. The reason is obvious. A patent appropriates the land it covers; and that land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly, the Government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself."

Spencer v. Lapsley, 20 How., 275;
Bush v. Ware, 15 Pet., 93;
Field v. Seabary, 19 How., 332;
Campbell et al. v. Doe, 13 How., 244.

Now it is a well established principle that a patent for unimproved lands, no part of which was in the possession of any one at the time it was issued, gives legal seizen and constructive possession of all lands within the survey.

Peyton v. Stith, 5 Pet., 485;

Miller v. McIntyre, 6 Pet., 61.

Such, it is conceded, was the condition of the lands in suit at the time the patent issued under which appellees claim. In *Trenouth v. San Francisco*, 100 U. S., 251, and *Atherton v. Fowler*, 96 U. S., 513, it was expressly said that a right of pre-emption can never be acquired by intrusion upon the possession of another.

FOURTH POINT.

The Land Involved Was Not Double Minimum Land Nor Was it Reserved Land at the Time of the State's Selection.

The appellant contends that the land in controversy was:

1. Double minimum land at the time it was selected by the State of Nebraska, on March 26, 1868.

2. That double minimum land was reserved from the operation of the act of 1841 establishing the right of pre-emption and providing for public improvements.

Both of these propositions are controverted by appellees.

The appellant contends that the land became double minimum land by reason (1) of the act of Congress conferring a grant of land to aid in the construction of the Burlington & Missouri River Railroad. (2). By the alleged action of the Land Department in withdrawing from market the land on either side of said railroad within the lateral limits of twenty miles. Since the decision of this court in *United States v. Burlington & Missouri River R. R. Co.*, 98 U. S., 334, and *Wood v. Railroad Co.*, 104 U. S., 331, it is beyond question that the grant of land to the Burlington & Missouri River Railroad Co. was of a specific quantity and was not confined to latteral limits. The effect of this is to exempt the land from the operation of the proviso of Section 2357, Revised Statutes of the United States. That proviso is as follows:

"Provided, That the price to be paid for alternate reserved lands, along the line of railroads *within the limits granted by act of Congress*, shall be two dollars and fifty cents per acre."

As the lands given to the Burlington & Missouri River Rail-

road Co. were not within limits granted by act of Congress, it follows that the price of even numbered sections within the grant was not affected by the said proviso of section 2357. This would certainly be the rule until the grant attached to specific lands.

If the grant were not absolute as to the certain sections of land, then the taking effect of the grant would depend upon the selection of the lands, by the company. This was undoubtedly the intention of Congress, and was the view acted upon by the officers of the road. It certainly was not intended that all the odd numbered sections of land in the State of Nebraska should be reserved to satisfy this grant. (See *Carr v. Quigley*, 149 U. S., 657.) It is equally plain that the even numbered sections did not become double minimum lands, before the grant to the railroad attached. The grant did not attach to the sections adjoining the one in controversy until December 8, 1871, the date of their selection by the agent of the railroad company. See Record, pp. 123 to 130.

The patent to the railroad is of date June 15, 1872. (See Record, p. 120.) The section involved in this action was selected by the State on March 26, 1868, and the selection approved March 24, 1870, and the land certified to the State March 29, 1870.

(Exhibit C. 1-2, p. 96, and Exhibit D. 1-2, p. 97, 98.)

In determining questions arising under grants similar to that of the Burlington & Missouri River Co., this Court has often held that "Until selection was made, the title remained in the Government, subject to its disposal at its pleasure."

Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S., 414, 421;
U. S. v. McLaughlin, 127 U. S., 428, 450, 455;
Wisconsin Cent. R. Co. v. Price Co., 133 U. S., 496, 511;
U. S. v. Missouri, K. and T. Ry. Co., 141 U. S. 358, 374.

Did the land involved herein become double minimum land by action of the Land Department?

Where a litigant attacks a patent issued by the Government,

he is required to substantiate the charges made by proof which is plenary.

Maxwell Land Grant Case, 121 U. S., 325.

In this case the appellant relies upon the letter of advice issued by James S. Wilson, Commissioner of the General Land Office. (See Record, p. 121.)

The essential portion of this letter is as follows.

"The Secretary of the Interior having under date of Dec. 17, 1866, and Jan'y 25, 1867, directed a restoration of lands withdrawn from the Burlington & Missouri River railroad *outside of twenty miles* from the line of said road, you are hereby instructed to restore the odd sections thus withdrawn in your district to the condition they were prior to the date of withdrawal. The lands to be restored are the odd sections which lie north of the line dividing townships four and five and south of the twenty miles limit of said road as shown on the diagram herewith. The odd sections within that limit are increased to $2.50 per acre and hereafter will only be subject to pre-emption and homestead at that price, except where inceptial rights under the pre-emption law may have accrued *prior to the receipt of these instructions by you.*"

The law of 1841, under which the grant was made to the State of Nebraska, is the pre-emption law. (5 U. S. Stats., 453.) It therefore became essential for the appellant to show that this letter was received by the local land office prior to the selection of the land by the State. There is no evidence on this point. The letter requires a report from the local land officers as to the matters set forth therein. The required evidence was, therefore, at the command of the appellant and should have been adduced by him. (*Colorado Coal Co. v. United States*, 123 U. S., 307. It is believed that in the absence of such proof the Court will presume that the land was selected by the State prior to the time the action of the Land Office, as set forth in the letter, became operative.

It will be observed that in the beginning of said letter it is recited that the Secretary of the Interior had theretofore directed a restoration of lands withdrawn for the benefit of the railroad "outside of twenty miles from the line of said road."

The land in controversy is more than twenty miles from the line of said road. It is twenty-one miles from the line of said road.

As to this fact, there should be no controversy. By reference to the map found in record, page 96, it will be seen that the red line marked with red flags indicates the line of said road as it was definitely located. The blue line beginning at the town of Denton indicates the line as constructed pursuant to the law of 1870 authorizing the change in location. The red line shows the location of the railroad at the time the land involved was selected by the State. The third red flag from the west side of said map is the point on said railroad directly north of the section in controversy. To locate the land in controversy on said map, proceed directly south from said third red flag to the irregular yellow line, with black base. The black line is the south line of Section 14, Township 5 North, Range 3, east, in which section is the land in controversy. Counting the sections between these two points it will be determined that said section fourteen is the twenty-first section from said road. If the count is made from the north side of the tract indicated as the "20 mile limit," it will be found that said section fourteen is the forty-third section from the north side of the alleged limit. (See map, page 96, of record.)

Commissioner Wilson when he undertakes to interpret this action of the Secretary of the Interior regarding the restoration of said lands, falls into the error that the land grant to the railroad company is confined to lateral limits. In fact the Land Department persisted in this erroneous view, (as shown by the correspondence with appellant's attorney), until the announcement of the contrary view by this court.

If the letter of Commissioner Wilson had the effect of making the land involved double minimum land, then his action was taken through mistake, inadvertance, or erroneous construction of the law, the facts and the action of his superior, the Secretary of the Interior. Recognizing this, the appellant seeks to establish the conclusiveness of the Commissioner's action whether right or wrong. (See p. 25 brief of appellant.) The appellees are constrained to concede that the determination of the Interior Depart-

ment upon questions of fact relating to the public lands is conclusive. If this is the rule, then, as all the questions of fact involved herein have been determined against appellant by this special tribunal of exclusive jurisdiction, he cannot be heard to complain thereof.

If the action of the land department regarding the land in question was as contended by appellant, it must find authority for such action in the general powers conferred upon the department by Congress. Whatever these powers are and in whatever way they may be exercised, the action is reversible by the land department itself so long as the title to the land remains in the Government. It is therefore believed that the court will hold that upon this land being selected by the State, and the character and location of this particular section being presented for final determination, the Interior Department, upon subsequent and particular examination of the law and the facts, did not adhere to the alleged view of Commissioner Wilson that the land was within twenty miles of the railroad, or that the price was two dollars and fifty cents an acre or was reserved, and thereupon exercised the highest power it possessed and conferred upon the State of Nebraska the title of the government in and to said lands. The certifying to the State of these lands is conclusive upon this question.

This Court said in *Grisar v. McDowell*, 6 Wall., 364,

"According to the practice of the Government, as recognized by Congress, the President may reserve from sale and set apart for public use, parcels of land belonging to the United States and he may modify by reducing or enlarging it, a reservation previously made."

As the land was certified by the Government to the State of Nebraska the presumption is that the reservation of this land if it ever existed, had been modified, and the land released from such reservation.

Subsequent to the time when it is claimed by appellant this land became double minimum, reserved land, Congress took action relative to all the lands embraced in the grants to the Pacific rail-

roads and branches. That act is as follows: (See 15 U. S. Statutes at Large, page 39.)

"An Act restoring Lands to Market along the Line of the Pacific Railroads and branches.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That nothing in the Act approved July first, eighteen hundred and sixty-two, entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' and the acts amendatory thereof, shall be held to authorize the withdrawal or exclusion from settlement and *entry, under the provisions of the pre-emption or homestead laws*, the even numbered sections along the routes of the several roads therein mentioned which have been or may be hereafter located: *Provided*, That such sections shall be rated at two dollars and fifty cents per acre, and subject only to entry under those laws; and the Secretary of the Interior be, and is hereby, authorized and directed *to restore to homestead settlement, pre-emption, or entry, according to existing laws, all the even numbered sections of land belonging to the Government, and now withdrawn from market*, on both sides of the Pacific railroad and branches wherever said road and branches have been definitely located."

This Act was approved March 6, 1868, and thereafter and on March 26, 1868, the State of Nebraska made its selections and the Secretary of the Interior approved them and the lists were certified.

This act did not withdraw the lands from market; its avowed intention was to restore said lands to market.

It will be observed that the language of the act is "to restore to homestead settlement, pre-emption, or entry, according to existing laws, etc." In this connection it is necessary to consider that the act of 1841, under which this grant to the State was made, is the act providing for pre-emption of public lands. The selection of the state was therefore within the exact wording of the act of Congress.

Whatever action had been taken relative to these lands prior to the passage of this act must give way before the force of congressional action, and under this statute the right of the department to

approve of the selections by the state of Nebraska ought not to be questioned.

It is submitted that this is the obvious intent of the statute, unless it is held that inasmuch as the grant to the Burlington & Missouri River Railroad Co. was without lateral limit, the alleged withdrawal was inoperative, and therefore the statute has no application thereto.

The appellant takes four different positions regarding the effect of action by the officers of the land department.

1. That if the Land Department so declare, it is conclusively determined that the grant to the railroad company is within lateral limits, and land twenty-one miles from the road is within twenty miles of it, although such determination is contrary to the law and the fact.

2. That when the Land Dapartment determines these questions in accordance with the law and the fact, and judicially act thereon, such action is void.

3. That the judicial determination and official action of the Land Department in holding that certifying the lists of land selected segregated the land included in said lists from the public domain, and therefore the appellant could not enter such land as a homestead, is a proceeding which the courts will ignore.

4. That the expressions of individual opinion, in letters written to counsel for appellant, not even arising to the dignity of *obiter dicta*, are entitled to bold-faced type in the brief, and are binding upon this Court.

FIFTH POINT.

The State had the Right to Select Double Minimum Lands Under the Act of 1841.

If it were to be admitted that the land in question was within the limits of a railroad grant and was double minimum land it still was subject to selection by the State. Section 8 of the Act of 1841,

commonly known as the "The Pre-emption and Internal Improvement Act" is in these words: (5 Stats., 453.)

"There shall be granted to each State specified in the first section of this act, five hundred thousand acres of land for the purposes of internal improvements; *provided*, that to each of the said States which has already received grants for said purposes, there is hereby granted no more than a quantity of land which shall, together with the amount such State has already received as aforesaid, make five hundred thousand acres, the selections in all of the said States to be made within their limits respectfully, in such a manner as the legislature thereof shall direct, and located in parcels conformably to sectional divisions and sub-divisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States, which said locations may be made at any time after the lands of the United States in said States respectively shall have been surveyed according to existing laws. And there shall be and hereby is granted to each new State that shall be admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission and while under a territorial government, for the purposes of internal improvement as aforesaid, shall make five hundred thousand acres of land, to be selected and located as aforesaid."

In pursuance of this act of Congress, Nebraska has passed various laws providing for the selection of these lands, and under these laws, the land described in the appellee's deeds were, as we have seen, selected and the selection approved, and patent of the State issued therefor.

The language of the act of 1841 is that the grant shall be located "on any public land not reserved from the sale by law of Congress or by proclamation of the President."

Nothing is said in regard to price of land. The test is, was the land selected public land. The question therefore arises, what is public land? This Court say the words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

Newall v. Sanger, 92 U. S., 763;

Doolan v. Carr, 125 U. S., 632;

Leavenworth etc., R. R. Co., v. U. S., 92 U. S., 733;
Bardon v. Northern P. R. Co., 145 U. S., 535;
Mann v. Tacoma Land Co., 153 U. S., 273.

If this land could be pre-empted, it was by virtue of the same act of Congress which conferred the grant upon the state. Pre-emption is nothing more or less than a sale.

If it could be taken as a homestead it was by virtue of the general act of Congress known as the Homestead Act. It certainly follows that if appellant could select land in thissection as his homestead the State could select it under the grant. The sections of the statutes cited by the appellant do not support his contention.

It is claimed by the appellant that "double minimum lands, by the provisions of section 2357, are reserved lands." Section 2357 is as follows:

"The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry: *Provided*, That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre."

This section certainly does not reserve the lands referred to from sale. On the contrary, it provides for their sale and fixes the price. By this section the lands are placed on the same footing excepting as to price.

The expression, "reserved lands," in the foregoing enactment clearly refers to the fact that they are reserved from the operation of the railroad land grants, and does not effect the operation of general laws. The test is, does Congress cease to have the right of disposal and control of land termed double minimum land? If not, then it is still public land. For what purpose were these alternate

sections reserved from the operation of the railroad grant? Obviously one object sought was to enable the Government to carry out the provisions of prior grants. Speaking on this subject this Court say:

"The manifest object of the general proviso was to exclude from the particular grant of lands previously reserved to the United States for any specific object whatsoever, and thereby enable the Government to accomplish those objects without confusion or conflict in the administration of the public domain, and thus keep faith with those to or for whose benefit prior grants were made."

United States v. Missouri, etc., Railway, 141 U. S., 369, and authorities there cited.

Double minimum lands are reserved *to* the Government. They are not reserved *by* the Government. The distinction is apparent. A military reservation or a national park is reserved *by* the Government. The even numbered sections within the limits of the Union Pacific land grant were reserved *to* the Government. A man can exercise his homestead right but once, and on one piece of land. As to him, the balance of the public domain is reserved to the Government, but it would be idle to say that therefore the remainder of the public domain is *reserved*. Land may be reserved *to* the United States, and in the same act, or by some other, reserved *by* the United States for specified objects. It then becomes segregated from the public lands, and is not controlled by the general laws, or by grants for objects not included in the reservation by the Government. Such was the case in *United States v. Missouri, etc., R. R. Co.*, 141 U. S., 371, and *Mullan v. United States*, 118 U. S., 278:

SIXTH POINT.

The Action of the Interior Department in Approving the Selection of the Land Granted to the State and Certifying the Lists Therefor is Conclusive.

A patent or certificate of the Land Department to land over which that department has the power of disposition and the jurisdiction to determine the claims of applicants for, is impregnable to

collateral attack, whether the decision is right or wrong, and it conveys the legal title to the patentee. In every case in which the power to hear and determine the claims of applicants for lands to the United States, and upon such determination to dispose of those lands, either under the pre-emption or homestead laws, under grants for railroads or other corporations, or by sale, or by any other recognized mode, has been vested in the Land Department, this Court has uniformly held that the patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack.

Minter v. Crommelin, 18 How., 87, 89;
U. S. v. Schurz, 102 U. S., 378, 401;
French v. Fyan, 93 U. S., 169, 172;
Quinby v. Conlan, 104 U. S., 420;
Smelting Co. v. Kemp, 104 U. S., 636, 645, 647;
Steel v. Refining Co., 106 U. S., 447, 450, 452;
Heath v. Wallace, 138 U. S., 573, 585;
Knight v. Association, 142 U. S., 161, 212;
Noble v. Railroad Co., 147 U. S., 174;
Barden v. Railroad Co., 154 U. S., 288.

Such is the rule in Nebraska. *Green v. Barker*, 47 Neb., 934. See also *Beley v. Naphtaly*, 73 Fed. Rep., 120, and *Moore v. Northern Pac. R. Co.*, 45 Pac. Rep., 215.

The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong.

Foltz v. Railway Co., 60 Fed., 316, 318.

If the land department is without jurisdiction its action may be void or voidable. If void, the title will not pass, but if voidable the legal title passes, and the rights of innocent *bona fide* purchasers will be protected.

The distinction between the two classes of cases is well illustrated by *Best v. Polk*, 18 Wall., 112, 117, 118, and *Minter v. Crommelin*, 18 How., 89. In the former case a tract of land was sold by the land department, and patented to a purchaser in 1847. But a Chickasaw chief had perfected his title to this land in 1839, under the provisions of a treaty between the United States and the Chickasaw Indians. The supreme court held the patent void, because the title to the land had passed out of the United States before the claim

of the patentee was initiated, and hence the officers of the land department had no jurisdiction over the subject matter of the patent. But in the latter case the land patented to a pre-emptor had been reserved by act of Congress to a Creek warrior, but the act provided that if the warrior abandoned his reservation it should be forfeited, and the secretary of the interior might order its sale. The supreme court held that the patent was *prima facie* evidence that the warrior had abandoned his reservation, that the secretary had ordered the sale, and that the legal title had passed to the pre emptor.

Another striking illustration of this distinction is found in *Doolan v. Carr*, 125 U. S., 618, 630, and *Quinby v. Conlan*, 104 U. S., 420. In the former case, the plaintiff, Carr, brought ejectment in reliance upon a title derived from a patent issued to the Central Pacific Railroad Company in 1874 under the Pacific Railroad acts. Those acts excepted from their grants to the railroad company the lands claimed under Mexican or Spanish grants. By the act of March 3, 1851 (9 Stat. 632), a commission had been created to determine the extent and validity of such claims under Mexican grants. An appeal was allowed by that act from the decision of the commission to the district court of California, and from the decision of that Court to the Supreme Court of the United States. The land patented to the Central Pacific Railroad Company in that case was within the limits of a claim under a Mexican grant, which was in litigation before some of these tribunals when the grants were made to the Central Pacific Railroad Company, and when the line of its railroad was definitely fixed and the claim under the grant was finally sustained by the Supreme Court long after those dates. The jurisdiction to hear and determine the claim to this land under the Mexican grant had been conferred by this act of Congress upon tribunals other than the Land Department; and the court held that the patent to the railroad company issued by that department was absolutely void, and its action in the premises without jurisdiction or authority. But in *Quinby v. Conlan*, (an action of ejectment), the patent under which the plaintiff claimed was attacked by an attempt to show that the land was within a reservation under a Mexican grant when the

rights of the pre-emptor were initiated. The determination of that question depended upon whether or not the public surveys had been extended over the land, and whether or not other land had been taken by the claimant under the Mexican grant in satisfaction of it. The Supreme Court held that the patent was a conclusive determination of this question, and could not be collaterally attacked, because "the question whether the land had been so freed from the reservation under the Mexican grant as to be open to settlement and pre-emption depended upon matters disclosed by records of proceedings in the Land Department," and that department had the jurisdiction to determine those question.

In *Steel v. Refining Co.*, 106 U. S., 447, 451, (an action of ejectment), the plaintiff's title depended upon a patent issued upon a claim for mineral lands within the limits of a townsite; and the defense was that the patent was void because the land was not mineral, and the patentee was not a citizen, and had not declared his intention to become one. The Supreme Court held that proof of these facts was inadmissible to attack the patent, and declared that the Land Department "must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is unassailable, except by direct proceedings for its annulment or limitation." To the same effect are *Heath v. Wallace*, 138 U. S., 753, 575, and *Barden v. Railroad Co.*, 154 U. S., 288.

That the Land Department possessed jurisdiction to enter upon the investigation of the right of the state to select this land, seems apparent. When the State of Nebraska desired to avail itself of the benefits conferred by the act of 1841, passed the necessary legislation, selected the lands desired and prepared the lists thereof, to whom should these lists be presented, and by whom approved and certified if not the Land Department? Section 2478 Revised Stats. U. S. provides that

"The Commissioner of the General Land Office under the direction of the Secretary of the Interior, is authorized to enforce and

carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for."

The Title referred to is "Title XXXII, The Public Lands."

The Land Department having entered upon the investigation must of necessity have determined the very questions now raised by appellant, and having determined them in favor of the State, and transferred the title of the Government, its action should be sustained by this Court not only because such action of the department is conclusive, but also because it was right. Congress appropriated a certain quantity of lands for schools to be selected by the Secretary of the Treasury, out of any unappropriated lands, and it was held that the selection by the Secretary was conclusive. *Campbell v. Township No. 1, etc.*, 13 How., (U. S.), 244.

In *Mower v. Fletcher*, 116 U. S., 380-386, the point here made arose as to the construction to be given the Act of August 3, 1854, (10 U. S. Stats. at Large, 346), which is now incorporated in Section 2449 of the Revised Statutes, so much relied upon by the appellant. It there appeared that by the Act of March 3, 1853, (10 U. S. Stats. at Large, 244), granting Sections 16 and 36 of the Public Lands in each Township to the State of California "for the purposes of public schools," it was provided that if Section 16 or 36 in any Township should be taken by a private claim, other lands might be selected in lieu thereof by the proper authorities of the State. Upon the belief that Section 36 had been taken in Township 2 South, Range 13 West, the State's agent selected lands in Section 32 in that Township, in lieu of lands in Section 36, the latter being "claimed to be within a Mexican or Spanish grant." It appeared, however, that at the time of making the selection, "the lands in Section 36 were and had ever since been in place, and the property of the State of California, and had never been under the claim of any Mexican or Spanish grant." The question presented was as to the effect of the selection by the State under these circumstances. This Court said that if the proper officers of the United States approved the selection in disputed territory outside the limits of an unsettled survey, and issued proper certified lists, and a purchaser under the title thus acquired entered into possession, no

one forcibly or surreptitiously coming into possession could make a pre-emption settlement which would defeat his title.

A controversy as to whether "lands embraced in such lists are not of the character embraced by such Act of Congress, and were not intended to be granted thereby," is a question of fact respecting which the officers of the Land Department are vested with authority to decide and determine. And this case holds that "all questions of mere irregularity in the selection are conclusively settled by the issue of the lists."

In *McCreery v. Haskell*, 119 U. S., 327, 334, at page 332, construing this same statue, the Court said:

"Irregularities in the transactions between the State Agents and its purchasers were matters which did not come under review by those officers. So far as the general Government is concerned, it was sufficient that the State did not complain, and accepted the selection in satisfaction of the grant to her. The claim of a third party could not be improved by showing irregularity in the proceedings to which the State did not object."

In endeavoring to meet this point, in Sub-division Seventh, (pp. 34-35) of their brief, appellant quotes (p. 34) from the decision of the Secretary of the Interior, dated June 25, 1884, (Record, p. 96), as if the quotation were a remark of that officer with respect to the certification of the lands in controversy made to the State of Nebraska. This is a grave mistake, as on examining the decision of the Secretary in full, it will be seen that the remarks quoted, wherein he says, "I refused to disturb the former adjudication," refers only to his decision in *Twin Lake Consolidated Placer Mining Co.*, 1 Brainard's Legal Precedents, 367. The Secretary made no such suggestions respecting the certification involved in the case at bar.

The authorities cited by appellant, that is, the two *Smelting Co.* cases, 104 U. S., 636, and 106 U. S., 451; *Johnson v. Towsley*, 13 Wall., 72; *Moore v. Robbins*, 96 U. S., 534; and *Shepley v. Cowan*, 91 U. S., 340, all following the doctrine elaborated in *Johnson v. Towsley*, *ubi supra*. There Mr. Justice Miller, in delivering the opinion of the Court, at page 86, said there was undoubtedly in all of the cases there urged upon the Court:

"Some special ground for the exercise of the equitable juris-

diction, for this Court does not and never has asserted that all the matters passed upon by the Land Office are open to review in the courts. On the contrary, it is fully conceded that when those officers decided controverted questions of fact, in the absence of fraud, or imposition, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that Department. But we are not prepared to concede that when, in the application of the facts as found by them, they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief."

Here it will be observed that a "misconstruction of the laws" by the officers of the Land Department "in the application of the facts as found by them," does not afford ground for equitable relief, unless such "misconstruction of the law" takes from a party that to which he *has acquired a legal right* under the sanction of those laws. It cannot be pretended that any misconstruction of the law by the certification to the State on March 24, 1870, pursuant to its selection on March 26, 1868, took from the appellant any right which he had then acquired. As we have already seen, the appellant does not claim that he even essayed to acquire any right until May 31, 1883.

The appellant is not in a position to assert a want jurisdiction by the Land Department over the land in question for he sought the assertion of that jurisdiction by his application to the department for permission to enter the land as his homestead, and that being denied he made further claim to the exercise of that jurisdiction by an appeal to the Commissioner of the General Land Office and the Secretary of the Interior. (See record, pp. 83-96.)

SEVENTH POINT.

The Appellant Asks for Relief in Equity Without Offering To Do Equity.

It is an undisputed fact, that appellees and their grantors have paid the taxes on the land ever since the year 1872, and that the total amount so paid is $1,375.81. The appellant does not now and never has offered to repay this amount or any part thereof.

In order to secure equity, the appellant must do equity. Therefore, before appellant is entitled to the benefit of equitable relief, he must repay to appellees the amount they have paid for taxes.

EIGHTH POINT.

The Appellees Being Innocent Bona Fide Purchasers for Value Holding the Legal Title Under the Patent From the United States, Their Equities Are Superior to Those of the Appellant, and Constitute a Good Defense to the Suit.

The conceded facts are that the land in question was selected by the State of Nebraska in 1868; the selection approved by the Commissioner of the General Land Office and the Secretary of the Interior in 1870; conveyed by letters patent by the State of Nebraska to the Midland Pacific Railway Co. in 1871; conveyed by the Midland Pacific Railway Co. to Joel N. Converse in 1871; conveyed by Converse and wife to David S. Gray, trustee for Joel N. Converse & Co., in 1873: conveyed by Gray, as such trustee, to the appellees, Reinhard and Fieser, for the consideration of $7,680 cash in hand in 1878. (See depositions, Reinhard, Fieserand Gray, Record, pp. 11-13.)

Since said purchase said Reinhard and Fieser have paid the taxes on said land, amounting at the time of the trial of this cause in the circuit court to $1,375.81.

The inception of the claim to this land now made by appellant is of date May 31, 1883, at which time he sought to enter the quarter section involved, as a homestead. This was fifteen years after the selection by the state. Five conveyances of the land were on record. The deed conveying to appellees had been on record for more than four years and appellant had actual knowledge of appellees' claim of title. The Local Land Office refused to receive his application, and on appeal to the General Land Office the Secretary of the Interior, the refusal was sustained.

Under such a state of facts, the equities of innocent *bona fide* purchasers are clearly superior to the claim of appellant.

Boone v. Chiles, 10 Pet., 177-209;

Townsend v. Little, 109 U. S., 504;
Stanley v. Schwalby, 162 U. S., 255-276;
Flent v. Arnold, 2 Met., 619-623;
Porter v. Bishop, 25 Fla., 749;
People v. Swift, 96 Calf., 165;
McSorlep v. Hill, 2 Wash., 648;
Gaines v. New Orleans, 6 Wall., 642;
2 Pom. Eq. Jur., 2d ed. Sec. 776, 777, 871, 918 and cases cited in notes.
Bishop on Contracts, Enlarged Edition, Secs. 672, 673;
1 Story's Eq., (13th ed.) pages 415-417, Secs. 409-411;
Ib., page 436, Sec. 434, Ib. 438, Sec. 436.

Even if the suit were brought by the United States, the superior equities of such *bona fide* purchasers would defeat the action.

United States v. Burlington R. R. Co., 98 U. S., 334, 342;
Colorado Coal Co. v. United States, 123 U. S., 307, 313;
United States v. Marshall Mining Co., 129 U. S., 579, 589;
United States v. California-Ore. Land Co., 1 C. C. A., 330, 332;
Id. affirmed, 148 U. S., 31, 40;
United States v. Dalles Military Road, 41 Fed. Rep., 493, 497;
Id. affirmed 2 C. C. A., 419, 426;
Id. affirmed 148 U. S., 49;
United States v. Winona and St. P. R. R. Co., 15 C. C. A., 96, 108.
United States v. St. Paul & S. C. R. Co., 15 C. C. A., 121.
United States v. Union Pac. R'y Co., 15 C. C. A., 122.
United States v. King, 9 Mont., 79;
United States v. Des Moines &c. Co., 142 U. S., 510, 524, 530, 531.
Randall's Case, 10 Land Dec., 54 *et seq.*

It is argued that the deed conveying the land to appellees was

a quit-claim deed, and therefore appellees were not *bona fide* purchasers. Under the law as it now prevails in America, the question of whether or not the deed of conveyance is a quit-claim deed is immaterial. The rights of a *bona fide* purchaser do not depend upon the wording of his conveyance. A quit-claim deed is as good as any other form of conveyance.

In a learned opinion rendered by the Supreme Court of Nebraska as late as the 16th of September, 1896, in *Schott v. Dosh*, 68 N. W. Rep. 346-350, it is clearly shown after an exhaustive discussion of the point that

"The question is not under what form of conveyance one claims, but whether one is a *bona fide* purchaser; and that therefore, the holder of a quit-claim deed is entitled to the same protection as one under a deed of bargain and sale or containing covenants of warranty." 68 N. W. Rep. at p. 348. See a note on this Nebraska case, 10 Havard Law Review, p. 251.

Moelle v. Sherwood, 148 U. S., 21, 28;

United States v. Calf. & Ore. Land Co., 148 U. S., 31, 45;

McDonald v. Belding, 145 U. S., 492, 496.

The deed to appellees from their grantor was *not* a quit-claim deed. In discussing what constitutes a quit claim deed the Circuit Court of Appeals for the Ninth Circuit quote with approval the language used by the Texas Court as follows:

"Whether the conveyance be a quit claim or not is dependent upon the intent of the parties to it, as that intent appears from the language of the instrument itself. If the deed purports and is intended to convey only the right, title, and interest in the land, as distinguished from the land itself, it comes within the strict sense of a quit-claim deed. If it appears that it was the intention to convey the land itself, then it is not such quit-claim deed, although it may possess characteristics peculiar to such deeds. The use of the word "quit-claim" does not restrict the conveyance if other language employed in the instrument indicates the intention to convey the land itself. *Garrett v. Christopher*, 74 Tex., 453."

United States v. California & Ore. Land Co., 49 Fed. Rep., 497-499;

Id., affirmed 148 U. S., 31 46;

United States v. Dallas Mil. Road, 2 C. C. A., 419-429;

Id,, affirmed 148 U. S., 49.

The deed from Gray, Trustee, to appellees does not purport to be merely a release of his right, title and interest, but is strictly a deed of bargain and sale. The granting clause is in these words:

"Know all men by these presents: that we David S. Gray, trustee for J. N. Converse & Co., and Eugenia D. Gray, his wife, of the City of Columbus, in the State of Ohio, in consideration of seven thousand six hundred and eighty dollars paid by Jacob Reinhard and Frederick Fieser, have bargained and sold, and do hereby sell, grant and convey, unto the said Jacob Reinhard and Frederick Fieser, their heirs and assigns, forever, the following real estate, situate in Saline County, State of Nebraska, to-wit:

All of Section fourteen (14), town. five (5), range three (3) east of the sixth principal meridian, and containing six hundred and forty (640) acres, according to Government survey."

And the *habendum* is "to have and to hold the said premises with the appurtenances unto the said Jacob Reinhard and Frederick Feiser, their heirs and assigns forever."

Under the rule laid down in the cases above cited it is very clear that such a deed is something more than of a quit-claim and release. It is a deed of bargain and sale and will convey an after-acquired title.

The title passed from the government to the appellees by five conveyances. From the government to the State of Nebraska and from the state to the railroad company, by letters patent. The railway company was a *bona fide* purchaser.

United States v. Des Moines &c. Co., 142 U. S., 510.

The railway company conveyed the land involved herein, with other lands, to Converse for the consideration of one hundred and twenty-five thousand dollars cash in hand. Under the authorities cited herein before, Converse was a *bona fide* purchaser.

Converse deeded to Gray as a trustee. Gray was a *bona fide* purchaser.

N. O. &c. Co. v. Montgomery, 95 U. S., 16, 18;

Carpenter v. Longan, 16 Wall., 271.

Gray conveyed to the appellees. The appellant now asks

that this title so established, shall be by a court of conscience, either entirely destroyed or presented to him, by reason of acts preformed by him with full knowledge actual and implied of the rights of these appellees, which said acts were hostile to the Government, opposed to the instructions of the Land Department, and in violation of the law, and palpably prompted by a desire to take advantage of the accidental mistakes of others. It would seem that the full measure of relief a court of equity could give such a litigant, is to provide him a conscience.

The appellant contends under the eighth point of his brief, pages 35 and 36, that appellees cannot be considered innocent purchasers, because, "Where a person must trace his title through a grant from the general government, he is charged with notice of the law under which the officers act, and is bound to inform himself as to the extent or limitation of the power and authority of such officers," and also that appellants were "bound to inquire whether or not the lands in question selected by the State of Nebraska, and subsequently conveyed to them through several *mesne* conveyances, were of the kind and character mentioned in the act of September, 4, 1841." This is not the view of the law heretofore expressed by this Court. In *United States v. California, &c., Land Co.*, 148 U. S., 45, this Court say:

"If a patent from the government be presented, surely a purchaser from the patentee is not derelict, and does not fail in such diligence and care as are required to make him a *bona fide* purchaser, because he relies upon the determination made by the land officers of the Government in executing the patent, and does not institute a personal inquiry into all the anterior transactions upon which the patent rested."

In *United States v. Marshall Mining Co.*, 129 U. S., 589, this Court say:

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

In *Moore v. Robbins*, 96 U. S., 530, 533, this Court say:

"It is part of their, (the officers of the Land Department),

daily business to decide when a party has, by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the Government a title to any part of the public domain. This decision is subject to an appeal to the Secretary, if taken in time. But if no such appeal be taken and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the Government passes with this delivery."

In *Railroad Co. v. Whitney*, 132 U. S., at p. 366, this Court said of the action of these officers in a similar case:

"It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense; But on questions similar to the one involved in this case they are entitled to great respect at the hands of any Court. In *United States v. Moore*, 95 U. S., 760, 763, this court said:

'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret.' See also *Brown v. United States*, 113 U. S., 568, 571, and cases there cited; *United States v. Burlington &c. Railroad*, 68 U. S., 334, 341; *Kansas Pacific Railroad v. Atchison Railroad*, 112 U. S., 414, 418."

As was said by the U. S. Circuit Court of Appeals in a recent case, in discussing this identical proposition:

"It is no wonder that purchasers of this title rested in fancied security on a title sustained by decisions to which the Supreme Court pays such respect."

U. S. v. Railroad Co., 15 C. C. A., 96 112.

It is believed that the equities of this case are clearly with the appellees, and this court is respectfully asked to affirm the decree enrolled in the trial court, and affirmed by the Circuit Court of Appeals.

OMAHA, Neb.,
January 4th, 1896.

CHAS. E. MAGOON,
CHAS. OFFUTT,
Solicitors for Appellees.